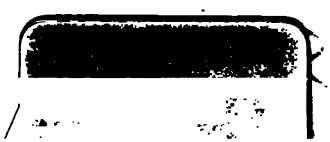
Private Int.
510



A TREATISE

ON THE

ENGLISH LAW OF DOMICIL.

BY

OLIVER STEPHEN ROUND, Esq.,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

LONDON:

WILLIAM DRAPER,

[SOLICITORS' JOURNAL AND REPORTER OFFICE]

59, CAREY STREET, LINCOLN'S INN, W.C.

1861.

LONDON:
YATES AND ALEXANDER, PRINTERS, 32A, LUDGATE-HILL.

TO THE

RIGHT HONOURABLE

SIR RICHARD TORIN KINDERSLEY,

VICE-CHANCELLOR OF ENGLAND;

the following pages

ARE,

WITH FEELINGS OF THE MOST RESPECTFUL ESTEEM,

(BY PERMISSION)

dedicated

BY

The Author.

TABLE OF CHAPTERS.

PREFACE.

It is now nearly three years since this work was commenced, but as it was chiefly in vacations, without the aid of books, but of notes only collected at spare moments, that any progress could be made, the completion has been delayed from time to time. During the interval that has elapsed, several most important decisions on the question of domicil have been given to the legal world; and it has been the aim of the author to weave these into such parts of his subject as they seemed to apply to, and so to bring the law down to the moment of publication. As the following sheets apply chiefly to English domicil, by keeping that object in view it is hoped that direct collision with the other works on the subject has been thereby avoided as much as was possible. Having regard to the many "errors and insufficiencies" in these pages, a few remarks are offered for those who honour them with a perusal. The work was entered upon with a feeling, in which many will probably sympathise, that, once begun, the subject would work itself out; and, to a certain extent, this was true. The maxim *sunt certi denique finesse* then began to press, and it also became obvious that *brevis esse laboro obscurus fio* was equally true. To these difficulties, and above all that of arrangement, the reader must be referred for much that will, it is feared, be found unsatisfactory; but all that can be said is, that, without referring unnecessarily to quotations from the civil or Roman law, it is believed there is no branch of the subject which is not touched upon; shewing, at all events, how the great principles applicable to the whole may be applied to that portion. It may be thought that undue length has been given to the consideration of the cases, and too little space to extracts from ancient writers. To this, it is answered, that as

the cases form in fact the foundation of the law, it is by them that the principles of the law are both established and exemplified, whereas the early occurrence of what we now call "domicil," belongs to a totally different state of society to that which now exists, when what we have to consider is what society and the law are at present and how they now subsist in relation to each other. Scotland has been the fertile source of most of the cases of domicil, and hence necessarily a large portion of this work has been devoted to the consideration of Scotch cases, replete as they are, with the most valuable *dicta* of the most eminent lawyers in the world, with the particular advantage that those observations are generally sanctioned and corrected before being printed, by the judges themselves, by whom they were uttered, thereby having all the value of written opinions. That branch of the law of England which relates to domicil has of late years gained so much importance from the number and complexion of the cases turning upon it, that a consideration of these in the form of a treatise may not be without its use. There are, at present, but two works upon the subject, that by Dr. Phillimore, of which his modesty takes a far different view to that which has been awarded to it by the legal public, and that by Mr. Cole relating only to one branch. In other works the matter is treated of *inter alia*, and a great many of these form no part of an ordinary law library. To collect the different parts under the various headings to which they refer is the chief object of the writer of the following pages, and the utmost pains have been taken to make each, by means of copious references, at all events, accessible. It is almost superfluous to say that the deductions attempted are rather intended to lead to a closer investigation of the points referred to, than put forward as axioms, or enunciations of principle, except so far as they are warranted by the authorities. With these observations it is with the greatest diffidence that the author leaves his production in the hands of the public.

ALPHABETICAL LIST

OF THE CASES CITED IN THIS VOLUME, WITH THE PAGE IN WHICH THEY ARE REFERRED TO.

ALPHABETICAL LIST

OF THE CASES AND OTHER AUTHORITIES CITED IN THIS VOLUME, WITH REFERENCES TO THE REPORTS, &c., FROM WHICH THEY ARE TAKEN.

INDEX

TO THE PRINCIPAL MATTERS, WITH THE PAGES WHERE THEY OCCUR.

ERRATA.

PAGE 28. In sidenote 7th line, for "*allerant*" read "*attendant.*"
„ 53. 25th line, for "*Gulpratte*" read "*Guepratte.*"
„ 54. 31st line, after "*tutus*" insert *Johnstone* v. *Beattie*, 10 Cl. & Fin. 42.
„ 64. 5th line, after "465" insert *Lanneuville* v. *Anderson*, 9 M. P. C. C. 225.
„ 84. 31st line, for "*Verne*" read "*Veine.*"
„ „ 32nd line, insert after "1852" *Quartin's case*, arret of cassation 25th August, 1847, 1 Dalloz. p. 273, and Duchess of Kingston's case, Coll. Jurid. 323.
„ 85. Sidenote, 6th line, for "*within*" read "*with our.*"

The Law of Domicil.

CHAPTER I.

INTRODUCTION.

SPELLING OF THE WORD "DOMICIL"—ETYMOLOGY—OBJECT OF THE WORK—DEFINITION DOUBTFUL—MODE IN WHICH THE QUESTION ARISES—THE LAW OF DOMICIL ANALOGOUS TO CONSTRUCTION—IMPORTANCE OF THE SUBJECT WITH RESPECT TO PROPERTY—NATIONAL IMPORTANCE OF IT—QUESTION OF DUTIES PAYABLE—FACILITIES OF TRAVELLING—SHADES OF DISTINCTION—DEFINITION DIFFICULT—LENGTH OF TIME—ABANDONMENT—REVERTER—FACTUM—ANIMUS—CLASSIFICATION OF CASES—DEATH IN ITINERE—INDICIA.

Spelling of the word.

Etymology.

THE word "domicile," or "domicil" as it is sometimes written, is of a modern introduction into our language, and should, if we have adopted it, I apprehend, to make it our own, be written in the latter mode, inasmuch as that spelling differs from that of all other words having the same signification in other languages. It is not found in Johnson, but is in Todd's Johnson, extracted from an old work, but not having any meaning analogous to our interpretation. "Domicile" in the French, and "domicilis" in the Italian tongue, signify "a dwelling house;" and thus we have the verbs "se domicilier" and "fissare il domicilio" in those languages, signifying to settle in a place. The Latin "domicilium," I think, was not the same as "domus," although "domus" might mean something included in "domicilium." Littleton's Latin,

CHAP. I.

dictionary gives it "an aboad," and quotes "sedes" from Cicero. But the word "house" refers more properly to the particular messuage or tenement, the particular structure in which we reside, than to the locality, town, village, parish, or country; whereas the "domicil" or "domicilium" includes that, and also takes in those other wider acceptations.

Object of work to consider the English law.

It is not my purpose in the following pages to consider the laws of other countries upon this subject, except so far as they bear upon and help to illustrate the principle upon which our own proceeds; and I shall therefore touch upon them merely as I proceed, and as it seems to me necessary, to indicate the premises from which the different conclusions, hitherto arrived at by our judges and by our legislature, have been drawn.

It seems to be at this moment in extreme doubt what is the proper definition of the word "domicil." Different interpretations have been proposed, and sought to be given of it. Sometimes it has been defined to mean "residence" only, sometimes "residence with an intention to remain," sometimes mere length of time—a number of years —spent in one place; but it is evident that all these only serve to shew the difficulty, without in the least removing it; and moreover, it is not by any means clear what "domicil" actually is, that is, under *all* circumstances. In America the question arises as to settlement and taxation.

Difficulty of definition.

Mode in which the question arises.

The mode in which the question arises in our courts of law or equity is usually with reference to the mode in which the property of a deceased person is to be dealt with, who has moved from place to place during his life, and who has to a certain extent, perhaps, acquired national or civil rights in more than one country. Thus a man born in England of English parents, resides here for a few years of his early youth, and possesses *ipso facto* an English domicil of *origin*; he then leaves this country for some other, either by emigration or otherwise, amasses property there, becomes a citizen of a state, or acquires the rights of a born subject of that country. In the meantime, circumstances have arisen that render a return to his native country

expedient; either he finds it by the death of relatives and the acquisition of property proper that he should return, or knowing when he has enough, and having prospered in business, his mind reverts to his native soil and natural ties which have been so long severed, and he returns and dies. This is the ordinary case, and although there are certain principles well recognised and established on the subject, yet it is obvious that even in such an apparently simple case circumstances may so vary one case from another in the same class, as to make it to the last degree doubtful how those principles apply to each; and in this it is that the present unsatisfactory state of the law upon this subject (for it must be admitted to be unsatisfactory) consists.

The law of domicil may be said to be analogous to the law of construction, inasmuch as the various circumstances under which a man passes an eventful and roving life may be fairly compared to the various vagaries which fill men's minds, and flow from their pens with regard to the ultimate disposal of their property. On questions of construction, as we all know, the principles are well established, and the whole difficulty lies in applying them to the case before us; and although in both cases "intention" is the grand governing indication to proceed upon, we cannot look into the mind of the person otherwise than as appears by his acts and words, written or spoken; and these are often so contradictory that, instead of assisting us, they lead us into a far greater maze of uncertainty. There is likewise a farther analogy between the two cases, that in both attendant circumstances are allowed to be called in aid to show what the "intention" was, as a kind of corroborative evidence in the case, the only difference being that in the case of a testamentary instrument, we have a written foundation to go upon; whereas in a case of domicil, the acts, coupled perhaps with the letters of the party, are the basis upon which the question must be decided. Laws were framed, not only for the restraining of crime and wrongful acts, and for the preservation of property, but for the proper transmission of that property from one person to another, or, failing that,

Analogous to construction of wills.

CHAP. I.

that it should contribute to the national wealth, by escheat or forfeiture to the crown or sovereign power; and hence every member of a state, and every subject of a country, possesses property distributable and controllable by the laws of that country of which he is a subject. The question of his domicil thus naturally arises; and an important question it is, for the duties and taxes imposed upon the transmission of property are as different in different countries as the general scope of the legislative enactments, and to this even those distant lands which are under our government are not an exception; for it happens (I mention this by way of example) that legacy duty is not payable upon Indian property even within our own rule, neither is duty payable upon charitable bequests in Ireland, although a portion of the United Kingdom; and hence, so far, these, although component parts of one great scheme of government, are as much foreign countries as any other foreign state. All this renders the law of domicil as important as it is involved in uncertainty; and the author of these observations has considered that a volume bringing under the notice of the legal public the numerous branches of this subject somewhat more in detail than it has at present been brought may not be without its use, particularly when it is considered that both our peaceful and our warlike relations have, with the wonderful march of invention in our own day, contributed to render travel so facile, both temporarily and pecuniarily speaking; and to make both national and personal friendships and ties of such a much more frequent and lasting character, than of yore between this country and the continent of Europe, even extending far into Asia; thereby also extending the probability of permanent residences by natives of all those countries in the others. The nice shades of distinction which have existed with regard to residence in foreign countries are very singular to observe in the cases that have been brought for adjudication, and which distinctly go to show what it is that constitutes a domicil, although it may still be difficult to give it such a definition as will hit every case.

Law of domicil in the colonies and in Ireland.

Facility of travel.

Shades of distinction.

Thus it has happened that every possible indication of intention has been shown to abandon a native country, and settle and reside permanently in a foreign one; where even the whole property of the individual has been invested in that foreign country, estates and titles purchased and large sums expended in ornamenting and beautifying the subject of the investment, and yet, if it so happened that possession was not actually taken, the intention, though clear, and so fully acted upon, has been held not to be sufficient to constitute a domicil in that country. It also seems extremely doubtful what length of time could be fixed as the limit of residence to secure the abandonment of an original domicil, and the acquirement of a new one, or what would be sufficient to constitute an abandonment of an acquired domicil, and a reverter of the domicil of origin, although it appears clear as a governing principle, that whether the intention be proved to exist or not, there must likewise be some act to be regarded as a *factum*, without which the *animus redeundi*, the *animus manendi*, or the *animus revertendi*, are of no avail.

Intention.

Length of time.

Abandonment

Reverter.

Factum.

Animus.

Many cases might be suggested other than those that have occurred, and we might speculate almost indefinitely as to what cases might arise, and what the view taken of the law as applicable to them might be; but it will be the aim of the author to classify the different branches of the subject under headings in a natural order, and consider and discuss each in its turn, laying down the principle applicable to each, and by illustrations of cases which have occurred, or might have occurred, lead the reader, at least to as satisfactory an understanding as the nature of the case will admit of, of the present state of the general law. In preparing these sheets, the use of notes will be as much as possible avoided, except, of course, as matter of reference; it being intended at the outset of every new heading to take as comprehensive a view as possible of that particular branch, and then to descend to its varieties and ramifications; and it will likewise be endeavoured so to systematize the whole as to render the index as complete and lucid as possible.

Classification.

Notes.

Arrangement of subject.

CHAP. I.

Many cases have arisen where a party has absolutely abandoned either a domicil of origin or an acquired domicil, but has died before he has carried out his intention, either the death happening *in itinere* or immediately before or after he has fulfilled his journey; and in these cases questions of importance have arisen, whether there really was such an abandonment as would balance against a reverter of the domicil of origin, or whether the abandonment, assuming that there was such, could be sufficient to enable the party to acquire a new domicil merely by the act of abandonment; but the same principles which apply to the general subject likewise apply to this; and the only question, therefore, would be, what residence is, and what is abandonment? Lastly, there is no circumstance, however small, however apparently insignificant, connected in any way with the disposition, character, and circumstances attending the movements of the party whose domicil is in question, that must not be taken into account, and every particle of evidence obtained in the least degree capable of bearing upon the point. All these are considered "*indicia*," upon which to raise "probable presumptions" in the question of intention, and as "*indicia*" merely in the absence of evidence of intention on the question of abandonment or residence. The foregoing observations have been made with the object of taking in the whole scope of the subject, that in reading the different details the principles which must guide the judgment may not be forgotten. Property is disposed of either by the will of the owner, or by the law of the country to whose laws it is subject; and as in both cases certain duties are inevitable, and as they vary so much in almost every country, the domicil is an important question.

CHAPTER II.

DEFINITION OF DOMICIL—DEFINITION DIFFICULT AND UNSATISFACTORY — FURNITURE — INTENTION TO REMAIN — DOMICIL REGULATES THE DEALING WITH PROPERTY OF THE DECEASED—ROMAN LAW DEFINITION—FRENCH—AMERICAN—WORD OF MODERN INTRODUCTION INTO OUR LEXICOGRAPHY — JOHNSON — TODD—VATTEL—LATIN AND GREEK DEFINITION—COMMON ACCEPTATION—AMERICAN STATUTES—OBSERVATIONS OF AMERICAN JUDGES—VATTEL ON THE RIGHTS OF BIRTH.

As I have hinted in my Introduction, a definition sufficient to take in the general meaning of the word "domicil" has always been, and still is, a matter of uncertainty,

"Grammatici certant et adhuc sub judice lis est;"

Definition uncertain.

and for this plain reason, that whatever definition you may give, depends upon something else; and thus you are endeavouring to describe a thing which has not and cannot be reduceable to one standard. For example, take the definition, "residence with intention to remain;" this depends upon two things extremely difficult to ascertain; namely, what is "residence," and what is "an intention to remain." At first sight this may be made a question, but let us consider it a moment, and I think it will be seen that I am correct; what is residence? it may be said to consist in a lengthened stay in one place, the purchase of a *domus* and furniture; and yet in most cases, even such a purchase as this may not be *in perpetuum*, but for a limited term only, and unless the party actually dies whilst in the enjoyment of such a fixed property, and unless that was his only fixed property of a like nature, it might be questionable how far a domicil had been created. This, of course, is putting an extreme case, but it is necessary that a general definition should take in every

CHAP. II.

case, and such a case as is here suggested has actually happened, in which commissions were issued to three several countries to examine witnesses, to show, if possible, which of many alleged domicils, standing apparently on precisely the same footing, should prevail.* Then comes the much more *vexata questio*, what is "an intention to remain," and this being the "*animus*," and not the "*factum*," is a matter entirely of evidence and deduction, and must vary in almost every case. It therefore really comes to this, that you can give nothing but a dependant definition, the fact being that a domicil is that which subjects a man's property to be dealt with according to the particular law of a particular country in which the domicil has been acquired; if Scotch, according to the law of Scotland; if English, according to the law of England; if French, according to the law of France, &c. It may be said again, that if a man resides for many years in a particular place, settling there for good reasons, and there remaining until his death, what question can there be as to his domicil? the answer is, there is none; but such a case never comes under the consideration of a court of justice, any more than a man of perfectly upright conduct ever comes within the clutch of the criminal law, as it is only on real questions of uncertainty that any point arises; for "De minimis non curat lex."

Definition dependant.

However, our law has endeavoured to give several definitions of this fickle thing, and we also find attempts made with a like object by foreign authors. Thus, according to the Roman law, a domicil, *domicilium*, translated usually "a habitation," is, "in whatever place an individual has set up his household gods, and made the chief seat of his affairs, without any special avocation." The word "home" is perhaps the shortest as well as the truest definition; but that still leaves the question open as to what is a man's "home." The French jurists define it to be "the moral relation that

Roman definition.

French.

* The case alluded to is *Lord* v. *Colvin*, 7 W. R. 251, where the evidence being pretty equally balanced, the domicil of origin was held to prevail.

subsists between a man and the place of his residence;" and Vattel using the word "domicile," translated by the word "settlement," says, "it is a place where a man has the intention to remain always." Boullenois says, "it is a place of society where he may enjoy the advantages of his labours;" and the American definition, where the word is actually used, is "residence at a particular place accompanied with proof or presumptive proof of intention to remain there for an unlimited time." There must be the intention and the fact.

Settlement.

American.

Word of modern introduction.

As I have before cursorily observed, the word "domicil" is of modern introduction into our language, not being found in dictionaries published as far back as Johnson's, but in Todd's edition he inserts it, and writes it "domicile" with an *e*, and quotes it from an old book called "Brevint's Saul and Samuel at Endor," p. 303, where there is this passage, "This famous *domicile* was brought with their appurtenances in one night from Nazareth over seas and lands by mighty angels, and can, if honoured with a visit, with an offering, and with a vow, cure in a moment all diseases." Todd's edition was published in 1827, but in an earlier work by Mason (1801), entitled an *Addendum* to Johnson's Large English Dictionary, the word "domiciliary" occurs, which he renders as adj., from *domicile*, French, "intruding into private houses;" and says in a bracket, "this word is a new offspring of the French Tyrrany," which Todd refers to, but seems to plume himself upon having discovered so erudite an authority as Brevint for the use of the word "domicile," which was, in fact, the first use of the French word in an English composition, and Brevint was not an Englishman, but a native of Jersey, although he graduated at Oxford, and was afterwards Dean of Lincoln; and therefore, allowing all honour due to Mr. Todd's industry, this I look upon as an accidental use of it, more particularly as the natives of Jersey speak French, and that it did not obtain till the year 1830 at the earliest in common use, except in America, and not then common; for in 1827 he was put to the necessity of searching for it in such a recondite authority. He admits, more-

CHAP. II.

over, that it was not to be found in our "lexicography," and says, "Burke uses the Latin word as if he had not known the English."

Vattel, in his Law of Nations, treats of the subject of "settlement" in precisely the same manner as "domicil" is now treated of at page 103 of his work, and as the French word "*domicile*" was translated "settlement," hence we may infer, that although the word itself was not used at that time in England (the middle of the eighteenth century when he wrote); yet the subject was then discussed among jurists, although it had not monopolized so much attention as since. We, however, find the word used as an English, or at all events as a Scotch word in the Dictionary of Decisions for 1813, Lord Eldon's notes, p. 199.

Used in Scotland.

In Littleton's Latin Dictionary, he translates it thus, "domicilium," domicolium, οἰκητήριον ἔναυλημα, "a mansion, a dwelling house, an aboad;" *Sedes*, Cicero. The word "mansion" certainly signifies a *fixed* residence, for although it may be let, yet it is usually something belonging to "the family," and likely to be retained as a residence. The next word, "dwelling-house," might be any house, so might the word "abode;" but the word "sedes," as used by Cicero, probably referred to the villa residences in the vicinity of Rome, that is, a place of retirement, or what we, probably from the same word, call a "seat," and there is no doubt that a "country seat" usually answers the description of a domicil. In the Rev. J. G. Wood's very pretty little work entitled "The Common Objects of the Sea Shore," the following passage occurs at p. 115, showing plainly in what sense the word "domicil" is taken by a scholar who is *not* a lawyer. "These creatures (soft-tailed crabs) are generally called hermit crabs, because each one lives a solitary life in his own habitation, like Diogenes in his tub . . . . The species here given is the common hermit crab (Pagurus Bernhardus), and the particular individual is inhabiting a whelk shell, a *domicile*, that is in great request when the creature grows to any size." It should be observed, in reference to this passage, that the creatures in question

Classical definitions.

make the shells of deceased univalves their *home* as long as they answer their purpose, and therefore the word "domicile" is used by Mr. Wood in the sense of "home," which these shells undoubtedly are to the crabs. The word "*domicilium*" is used by *Grotius*, lib. ii. cap. 5, s. 24, where there is this passage: "Romanis legibus saltem posterioribus *domicilium* quidem transferre licebat." The Roman law here referred to is as follows:—"Municipes sunt liberti et in eo loco ubi 'ipse' *domicilium* suâ voluntate tulerunt, nec aliquod ex hoc origini patroni faciunt præjudicium et utrobique numeribus astringuntur." Digest, lib. i. tit. 1. "Ad municipalem et de incolis." Leg. xxii. § 2. In the translation of *Grotius* by Mr. J. Barbeyrac, in 1788, the word "*domicilium*" is translated "habitation."

In the case of *Forbes* v. *Forbes*, 1 Kay. 341, *Vice-Chancellor Wood* observed how very unsatisfactory any general definition must be, because the very terms of it implied something else, which was to be defined; and Dr. Lushington, in a very late case came to the same conclusion; but whether we can exactly agree upon a set of words to express it or not, appears to me not to be very material, if we understand the requisite things to be proved to constitute it, the real question being, whether or not a person has by his acts and expressions placed himself in such a position as that, if he dies, the law of the country in which he then is, can be made applicable to whatever personal property (for to such only it applies) he leaves behind him; and I have rather considered this point with reference to the opinions expressed upon it, than to its materiality.

Legal definition.

By the statutes of the state of Massachusetts of 1692, 1701, and 1767, domicil is defined to be "coming to sojourn or dwell," "being an inhabitant," "residing and continuing one's residence," "coming to reside and dwell." In the case of *The Inhabitants of Abington* v. *The Inhabitants of Bridgwater*, 23 Pickering's American Reports, 170, the above statutes are quoted, and the following pertinent observations made upon the subject. "The question of domicil is often of the highest importance to a person, to determine his civil

American statutes.

CHAP. II.

and political rights and privileges, duties and obligations, it fixes his allegiance, it determines his belligerent and neutral character, and in time of war it regulates his personal and social relations whilst he lives, and furnishes the rule for the disposal of his property when he dies. Yet as a question of fact, it is often one of great difficulty, depending sometimes upon minute shades of distinction which can hardly be defined, and it seems difficult to form any *exact definition* of domicil, because it does not depend upon any single fact or precise combination of circumstances. If the above definition be adopted (referring to the statutes), which seems intended to explain the matter, and put it beyond doubt, it will be found on examination to be only an identical proposition equivalent to declaring that a man shall be an inhabitant where he inhabits, and be considered as dwelling or having his home where he dwells and has his home. It must often depend upon the circumstances of each case, the combinations of which are infinite. If it be said to be fixed by the place of his dwelling-house he may have his dwelling-house in different places, if it be where his family reside with himself he may occupy them indiscriminately and reside as much in one as another, if it be where he lodges or sleeps (*per noctat*) he may lodge as much at one as the other, if it be his place of business he may have a warehouse, manufactory, wharf, or other place of business in connection with his dwelling-house, in different towns." This extract will be sufficient to show how the mere question of definition stands; and although the observations are made in America by an American judge, they still apply equally to the general subject.

Before leaving this part of the question, which is in truth of considerable significance, I would refer to some observations made by Vattel at page 101 of his treatise, which are valuable not only by analogy, but to a great extent by direct application. "The whole of the country, possessed by a nation and subject to its laws, forms a part of its territory and is the common country of all the individuals of the nation." We have been obliged to anticipate the definition of

Vattel's definition.

the term "native country," because our subject led us to treat of the love of our country. . . . Supposing then, this definition already known, it remains to explain several things that have relation to this subject, that answer the questions that naturally arise upon it (*vide Vattel*, p. 63, s. 122). The term "country" seems to be pretty generally known, but as it is taken in different senses, it may not be unuseful to give it here an exact definition. It commonly signifies "*the state of which one is a member;*" in this sense we have used it in the preceding sections, and it is to be thus introduced into the law of nations. In a more confined sense, and more agreeably to its etymology, this term signifies *the state* (or even more particularly), *the town or place where our parents have their fixed residence at the moment of our birth;* in this sense it is justly said that our country cannot be changed, and always remains the same to whatever place we may afterwards remove; . . . . but as many lawful reasons may oblige a man to choose another country, that is, to become a member of another society; so, when we speak in general of this duty to our country, the term is to be understood as meaning "*the state of which a man is an actual member;* since it is the latter in preference to every other state that he is bound to serve with his utmost efforts. At p. 102, s. 215, he proceeds: "It is asked whether the children born of a citizen in foreign countries, are citizens? The law has decided that question in several countries, and those regulations must be followed. By the law of nature alone children follow the condition of their fathers, and enter into all their rights. The place of birth produces no change in this particular, and cannot, of itself, furnish any reason for taking from a child what nature has given him. I say, of itself; for civil and political laws may, for particular reasons, ordain otherwise, but I suppose that the father has not entirely quitted his country in order to settle elsewhere. If he has fixed his *abode* in a foreign country, he has become a member of another society, at least as a *perpetual inhabitant*, and his children will be members of it also." (I give this from the English translation

CHAP. II.

for greater convenience.) I have written in *italics* those portions of the above quotation which more directly bear upon my subject, and I think it is very clear that the subject now called by the word "domicil" entered very largely under the title of "settlement" (the French word "domicile" being so translated) into the consideration of the law of nations at the time Vattel wrote, and those expressions which I have so particularised apply very specially to it, as at present treated of and understood, besides referring to other portions of the same subject.

In considering any subject, it is of the last consequence that we should understand fully *what* it is we are going to consider; and hence, anything tending to elucidate the definition has its use.

CHAPTER III.

OF THE DIFFERENT KINDS OF DOMICIL—DOMICIL OF FOUR KINDS—SUBDIVIDED—OF ORIGIN AND BIRTH, WHETHER DISTINCT—ILLEGITIMACY—BIRTH ON SHIP-BOARD—COMPULSORY DOMICIL—THE WIFE—SEPARATION A VINCULO OR A MENSA ET THORO—CODE CIVILE AS TO MARRIAGE—INFANT — BASTARD — PRISONER — EXILE — SERVANT OF GOVERNMENT—HALF PAY.

Different kinds of domicil.

DOMICILS are of four kinds: first, domicil of origin; secondly, domicil of birth; thirdly, domicil by operation of law; and, fourthly, domicil of selection. Some domicils are called necessary, and these probably would come within the third class; these are, those of a wife, an infant, a servant, a student, a prisoner, an exile, a servant of the Crown, a domestic servant, an emigrant, an apprentice, a lunatic, and some others; but these would more properly, I think, be described by the word compulsory. It is very doubtful whether a man can have a domicil of origin different from his domicil of birth; for, up to the time when he attains his majority, his domicil would follow that of his father, unless he were illegitimate, in which case, although a minor, his domicil would refer to the country in which he was born, and so far be a domicil of origin and not of birth only. A domicil of birth does not properly arise during minority, but being acquired by birth would become a domicil of origin if continued after the party came of age; but domicils of origin, and the fact of birth or death in a particular country, are in the nature of *derniers resorts*, and never called into play, except in the absence of all others.

Domicil of origin and birth.

Domicil by operation of law would include all those cases where the act of the party has no hand in creating the domicil; thus, the domicil of an illegitimate child would be

CHAP. III.

By operation of law.

Selection.

Compulsory.

As to a wife.

Code civile as to marriage.

by operation of law, the domicil of a person born on board of a ship would be by operation of law as belonging to the country to which the ship belonged, &c.,—*see* Vattel, p. 102, s. 216. Domicil of selection would be, where a party actually became a resident with the intention to remain, and chose that particular locality as his home. The third class, as I have said, are divided into what I shall call compulsory domicils, and which I have treated of at large in another place. And, first, a wife's legal existence, except in some few particulars, is merged in that of her husband; and these very exceptions, which cannot arise unless under express provision, shew the truth of the general assertion. But none of these exceptions, as, where she has property to her separate use, where she has a power of appointment over property, where she possesses real estate, &c., affect the question of domicil; for a wife, ordinarily speaking, resides with her husband, and therefore his domicil would be her domicil, and unless she were separated *à vinculo matrimonii*, when she would cease to be a wife, her residence in a particular place could not affect her legally; because the mere effect of a deed of separation, or a separation *à mensa et thoro*, would not interfere with the legal bond; for, I apprehend, the general law looks only at general rights according to that law, and until these general rights are interfered with, which they could not be by private agreement, or by anything which does not touch the legal tie, the legal consequences of that tie follow and remain as they subsisted the moment after the marriage. As is well known according to our law a certain period (three weeks or three sabbaths) must elapse of continued residence by one of the parties, in a parish where a marriage is to take place, before the parties can be married by banns; and this rule finds a parallel in the *Code Civile*, 74th art., where it is provided that "the marriage shall be celebrated in the *commune* in which one or other of the parties shall be *domiciled* (see *Robins* v. *Paxton*, 6 W. R., 457), and the *domicil*, as regards the marriage, shall be established by six months' continued habitation within the same commune." The domicil of an

infant follows that of its parents, as, in the ordinary case, the domicil of both would be the same; but if the child be posthumous, the then residence of the mother would be the domicil of origin or birth of the child: and this would apply to an illegitimate offspring; for although a bastard (that is, a child not born in lawful wedlock according to our law) is *hæres neminis*, *filius* or *filia nullius*, yet, for the purpose of domicil that rule can only apply to the father, because he is not legally his father, however certain and notorious the fact of his paternity may be; but this cannot be the case with the mother, for, whatever doubt there may be whose son or daughter it is on the father's side there cannot be any, ordinarily speaking, on the mother's. With respect to the case of a prisoner, if his imprisonment be for any crime which does not create the absolute forfeiture of his property, real and personal, such as treason and crimes of that nature, or of his personalty, as felony (*vid. Harrop's Estate*, 5 W. R. p. 449), there can be no doubt as to his domicil being that of the country in which he is imprisoned. The same observations apply to the case of an exile, or one banished from his native country for some crime: but this could only apply to the case of one exiled for life, for unless the party exiled for a term confirms his compulsory domicil thus acquired by acts sufficient for the purpose, his former domicil would immediately revert on his return to the country from which he was exiled or banished. The case of a servant would stand somewhat on the same footing, except that his domicil is not so compulsory as in the cases of prisoners or exiles, but rather may be called a domicil of selection, although circumstances may create such a pressure as to make it in a manner involuntary or that in which his will has little or no concern. As appendant to this is the case of a servant of the Crown; and this branch may be divided into two classes—those who hold a direct office under Government, and are constantly engaged in the performance of active duties, and those who are in the pay of Government, but not performing any duty, and under the liability only to be called upon at any moment to serve. Many

The domicil of a bastard.

Of a prisoner.

Of an exile.

Of a servant.

Of a servant of the Crown.

CHAP. III.

cases have occurred which have received judicial decision coming under both of these heads, and chiefly respecting military men, who, either being on service, were transferred from station to station and country to country, or being in the receipt of half-pay followed some other calling; but up to the time of death continued to receive pay, got leave of absence extended from time to time, and died without ever having been called upon to serve.

In the first case it would be difficult to say that a domicil could be acquired by ever so lengthened a residence, where there was a liability to change it at any moment, and that at the will too of another power, over which the party himself could have no control; but still this is certainly a compulsory or necessary domicil, and if a person thus circumstanced remained or rather resided a number of years in one country, although perhaps not in the same place, and died there, that country would certainly be his domicil. On the other hand, it has been held that the mere extension of leave and continuance of half-pay from time to time did not prevent a domicil being acquired in another country than that by the Government of which the half-pay was granted, because the mere neglect of an application for leave would have forfeited the commission and dissolved the tie at any moment; *Cockrell* v. *Cockrell*, 4 W. R., p. 730. Having thus touched lightly upon the different kinds of domicil, I shall next proceed to consider what it is which constitutes the thing itself.

Vid. Vattel's Law of Nations, p. 203.

CHAPTER IV.

WHAT CONSTITUTES A DOMICIL—RESIDENCE AND INTENTION NECESSARY — PROPERTY — ABANDONMENT WITHOUT ACQUIREMENT—DOMICIL DEPENDENT ON PROPERTY—FURNITURE — ANIMUS REDEUNDI — BOOKS AND TRUNKS — LENGTH OF TIME—ONE FACT NOT SUFFICIENT TO CREATE A DOMICIL—THE RESIDENCE OF A WIFE—ANIMUS MANENDI—DOMICIL NOTWITHSTANDING ENTIRE REMOVAL OF PROPERTY—HALF PAY—ADMIRALTY ORDERS—INTENTION NOT SUFFICIENT.

WE have seen the etymology of the word "domicil," that it is a "house of residence," and not only so, but a house in which it is the intention of the party permanently to reside, and probably the shortest and truest meaning of the word is expressed by the one syllable "home," although no doubt that again depends upon what is considered as "home." We have also seen what is an abandonment, what is an acquirement of a domicil, and what is a domicil *ab origine aut nativitate*. We now come to a thing apart from all these, namely, what is necessary to constitute a domicil? To possess a domicil the necessary ingredients are, *residence*, and *intention;* and it is therefore a *sequitur*, that for the purpose of residing there must not only be the act called residence, but the thing called *a* residence; and I think, at this present period, it must be assumed that there is some kind of property in that residence to make it a domicil. On the other hand, intention may be manifested almost without the possession of property, although the proof in that case is of a very negative nature, that is, where a party having acquired an undoubted domicil in one country either by birth or act of his own, abandons but does not lose such domicil; because he does not acquire another,

What necessary to constitute a domicil.

Possession of property.

CHAP. IV.

in which case we are compelled to prefer the best of two very unsatisfactory states of circumstances. However, it generally happens that a man has some species of "home" in some country, and if he has not, yet possesses or retains some species of property, which raises an inference that he intended at some period to return to this spot and there permanently abide; or at all events, that he has never had an intention to abide or reside anywhere else. Of course, if a man possesses no property, no question of the sort can arise; because there is nothing whereon the law of any country can act, as it is in consequence of the possession of property and upon that possession that the law of domicil arises. In the case of *Cochrane* v. *Cochrane* (now subsisting under the title of *Lord* v. *Colvin*), *Sir Launcelot Shadwell*, the late *Vice-Chancellor* of *England*, decided that the retention of furniture was a sufficient *indicium* to fix the domicil as Scotch, and expressed that to be his opinion upon general principles, and specially as showing the *animus redeundi*, including of course the *animus manendi*, when the former *animus* had become a *factum*, and which might be assumed as a natural or rather as a highly probable consequence; but also upon this further principle that the domicil had been Scotch, and was not displaced by another on the fact of the retention of furniture which was in fact tantamount to a retention of a domicil which had been acquired, and was prevented by this circumstance from being lost. This case occurred in May, 1848, and was argued upon exceptions, but is unreported, except in the public press; and it is worthy of notice that in the case referred to, not only did the present Vice-Chancellor Sir John (then Mr.) Stuart give an opinion that the domicil was Scotch, but the present Vice-Chancellor Kindersley has at the hearing decided it to be Scotch. The soundness of this decision, I think, cannot be called in question, and hence *a fortiori*, if the possession of furniture is sufficient to support a domicil, the possession of a house and land would be, even though there were no immediate appliances sufficient to enable the party actually there and then to reside, annexed to it. Nay more, in the case of *Attorney*

Inference of intention.

Retention of furniture.

Possession of a house and furniture.

General v. *Fitzgerald*, 4 W. R., p. 797, it was held by *Vice-Chancellor Kindersley*, that the leaving books and trunks was sufficient among other *indicia* to constitute a retention of an English domicil. The length of residence has always been thought an important *substratum* whereon to build a domicil; no doubt, for the obvious reason, that whatever the intention of the person may have been, that is, at all events, a substantive fact, or in other words, an act done sufficient *per se* to constitute a domicil, or if not, wanting very slight circumstances conjoined with it, to do so. In *this* sense, however, I imagine that the length of time must be considerable (for I know of no actual limit which has been fixed by decision, except in the case of *Bremer* v. *Bremer*, 1 Deane, 192, where in the course of Sir John Dodson's judgment there is this passage:—"Time alone will not constitute a domicil; a person may remain for fifty years in a particular place with an intention to return, and the original domicil is not considered to have been abandoned; and undoubtedly this is quite true." Long residence in one place is a material ingredient from which intention may be collected; but it is also absolutely necessary that there should be evidence of some sort of *animus*, although of course the longer the residence, the less necessary is the amount of *animus*. Whereas, supposing a house and land are taken, furniture purchased, and servants regularly hired, either where it is on a twenty-one years' or some long lease, or where the property is purchased out and out a much shorter time would be sufficient, supposing at the time of the death under such circumstances, there was nothing to show an intention permanently to break up such establishment, and therefore, a mere residence, even of some months elsewhere, and leaving the establishment of servants upon board wages, would not prevent there being still sufficient to constitute a domicil, *vid. Forbes* v. *Forbes*, 1 Kay. p. 341. It is scarcely possible to conceive a case in which *one* solitary fact could create a domicil (except in the cases of necessary domicils treated of in another chapter), and therefore is it that every minute circumstances attending the conduct

Possession of books and trunks as an additional fact.

Length of time.

Insufficiency of a mere *factum*.

CHAP. IV.

and position of the party is so requisite to be brought forward. It oftentimes happens that there may be *indicia*, many in number, and yet it is still doubtful whether they constitute a domicil; but the addition of *one* circumstance, of some weight, completes as it were the necessary sum total and constitutes the domicil, and this circumstance in *Forbes* v. *Forbes* was the residence of the wife. It would, perhaps, be very difficult to enumerate all the circumstances necessary to create a domicil, but the guide to determine what circumstances are necessary is that, coupled with facts, there must be some circumstance or circumstances to show an intention permanently to reside, and after all that is the key-stone upon which the whole question turns. It is not necessary for the purpose of proving a domicil in any particular country that a residence should be proved to exist in any particular portion of or place in that country; it being enough that a domicil having been there acquired, no domicil has been acquired elsewhere, or that there are *indicia* to show an intention at some time or other to return to and reside in it, and therefore I think it is clear upon this principle, that where a party is possessed of property sufficient for a residence in one country, but procures tenants for it and spends his time in travelling from place to place abroad (a common case), his domicil is still subsisting in the country wherein his property is situated. A question has often been raised with regard to persons in the service of Government; and as bearing upon this question the case of *Brown* v. *Smith*, at the Rolls (21 Law Journ. N. S. 356), was a somewhat singular one. In that case William Cornborough Watt, a Scotchman by birth, and a surgeon by profession, came to England and was appointed hospital mate at Haslar hospital; he afterwards acted as assistant-surgeon and surgeon on board of various vessels of the Royal Navy during several years, as also on board several convict ships, and twice during these periods, being on half pay, he visited Scotland, and remained there up to the time of being again on service, but ultimately, being on the Malta station, he there died.

Residence of a w.fe.

As to particular localities.

Naval officers.

At this time he had entirely removed every article of property he possessed, and likewise his sister and only relation, from Scotland, on the last occasion of his visiting that country; but the *Master of the Rolls* thought that he had not lost his Scotch domicil, and decided accordingly. This, no doubt, is a very strong case; but it only carries out the principles I have endeavoured to evolve, namely, that where a domicil has been acquired, and subsists *ipso facto*; until another is acquired, such domicil of acquirement or origin is not lost, although it may be apparently abandoned. The latest case upon this part of the question is that of *Cockrell* v. *Cockrell*, 4 W. R., p. 730; where the Crown claimed legacy duty on the ground of an English domicil. The circumstances were shortly these. The testator, Mr. Cockrell, being on half pay and invalided from his Majesty's ship *Weazel*, went to Calcutta, where he founded the well-known house of Cockrell & Co., and amassed a fortune of nearly £200,000 in the course of ten years, married, had children and died there; and it appeared that he had from time to time obtained leave of absence from our Government, and still retained his half pay up to the time of his death. In this state of things he made his will, and left large legacies, &c.; and legacy duty being payable if his domicil was English, but not if it was Anglo-Indian, the matter was contested with some energy. The *Vice-Chancellor* took time to consider the case, for the purpose of investigating the nature of the Admiralty orders; and as it appeared that the effect either of outstaying the leave of absence or neglecting to apply for further leave when one period was expired, would be simply a forfeiture of the half pay, *his Honour* thought it so very improbable that, had the occasion arisen, Mr. Cockrell would have elected to retain his half pay against such a profit as he was then making by his business, that he decided his intention to have been all along permanently to reside in India, although as long as he could, he had retained his half pay, and held accordingly that his domicil was Anglo-Indian and not English. This case, therefore, was decided on the in-

Removal of property.

Abandonment of domicil of origin.

Half-pay.

Admiralty orders.

CHAP. IV.

tention as constituting the domicil joined with ten years' residence, and it cannot be doubted that the mere fact of being in the service of a Government, unless accompanied by permanent residence, will not of itself constitute a domicil; *vid. Hodgson* v. *Beauchesne*, 7 W. R. 397; and 33 L. T. 36. Coverture, minority, imprisonment and exile, may *ipso facto* constitute a domicil; but this subject will be found discussed under the head of "compulsory domicil." Of the insufficiency of intention only to constitute a domicil there can be no doubt, and it has also been held that a testator's description of himself is not sufficient for that purpose. *Vid. Whicker* v. *Hume*, 13 Beav. 366, afterwards carried to the House of Lords, and which will be hereafter referred to.

Testamentary description.

CHAPTER V.

OF THE EVIDENCE NECESSARY TO ESTABLISH A DOMICIL—EVIDENCE OF EVERY KIND NECESSARY—DIRECT, INDIRECT, AND CIRCUMSTANTIAL—PARENTAGE—OCCUPATION—VIEWS—INTENTIONS—INFERENCE—PROBABLE PRESUMPTION—PROPERTY—REAL ESTATE—EXPRESSIONS—CORRESPONDENCE—CONNECTION KEPT UP FROM A DISTANCE—DIRECT EVIDENCE MAY BE REBUTTED—TWO SIMILAR RESIDENCES—HABITS—MOVEMENTS—ABANDONMENT AND ACQUIREMENT—OPINIONS OF AMERICAN JUDGES—EASIER IN AMERICA THAN IN ENGLAND.

IN another portion of this Treatise I have touched cursorily upon the subject of the evidence necessary to establish a domicil, which I shall now proceed to consider in detail.

Evidence necessary.

The evidence requisite to be brought forward upon a question of domicil embraces almost every species that can possibly be obtained—direct, indirect, and circumstantial. Direct evidence of facts relating to the birth, parentage, movements, and occupation of the individual whose domicil is in question; indirect, with reference to his intentions and views during such periods; and circumstantial, as regards any events connected with either of the other branches, and which may have any bearing upon them.

Direct, indirect, and circumstantial.

Thus a man's birth, movements, and occupation, are facts of which, generally speaking, direct evidence may be obtained; whilst communications had with him or made from him to others, and acts done by him, may be matters leading to inferences only, and not of themselves sufficient to constitute significant facts, although not without their use and force as connected with facts; habits also may stand on this footing, whilst a variety of circumstances, not, perhaps, coming under either the head of evidence direct or indirect, may still supply a wanting link in the chain, to support "a probable

CHAP. V.

presumption," and are chiefly of consequence where the balance is very nicely poised.

Property possessed by the party and its nature would come within this latter class, and the more solid its character the more it would, in all probability, be of value. Thus the possession of real estate or appendants to realty would be of weightier signification than the mere possession of personal chattels or money, or securities for money, because, although the latter may be much more valuable *per se* than the former, yet it is not necessarily so coupled with an intention to use it in any particular locality, being capable of transmission with so much greater facility; whereas anything in the nature of realty or appendant thereto, as lands, houses, or furniture, are indicative of an intention at some period to reside, and are important therefore as *indicia*.

Possession of property real and personal.

Another class of indirect evidence which often weighs considerably in doubtful cases belongs to the expressions made use of by the person whose domicil is to be determined, and more especially in the exercise of any dispositionary powers, although a correspondence is often of the last consequence as furnishing the means of arriving at a conclusion otherwise unattainable. As I have elsewhere said, it being impossible to see the mind of the party whose intention we wish to collect, it must be got at, and can only be got at, by the consideration of, perhaps, a large mass of evidence, consisting of a variety of component parts, not one of which alone would be enough to furnish a deduction, still arrived at with very little moral doubt, upon the whole. Thus the retention of a connection with a native country, during a long residence in a foreign one, has been thought to be a very significant circumstance; and it is more than doubtful whether, if the breaking off of such connection would be followed by a loss more than capable of balancing the interest attached to the foreign residence, a domicil that would otherwise be absolutely acquired by length of time and other necessary attendant circumstances in such foreign country would be so regarded by our law.

Expressions used oral and written.

Retention of a connection with a native country.

Upon this branch the evidence must be distinct not only as to the connection itself, but as to the effect which such connection has upon the movements and rights of the party, which occurs chiefly where it is of a Government nature, such as half-pay, pensions, &c., which I shall have occasion to consider in another place. Direct evidence is generally easy of attainment; as, for instance, birth, death, acquirement of property and pursuit of occupation are things notorious, as being necessarily connected with the affairs of other people; whereas intention and personal acts refer only or chiefly to the individual immediately concerned; and it must always be borne in mind that direct evidence standing by itself is of value only as so standing; for it is capable of being rebutted by circumstances, as much as of being confirmed. To illustrate this, suppose the case of a person having two residences in every respect similar in two different countries, the one his birth-place, the other not, and there not being one tittle of direct evidence besides such facts; is it not manifest that attendant circumstances would be capable of very much governing the opinion of a court of law or equity in such a case, either to rebut or confirm a contention for one or the other being *the* domicil? Assuredly they would, for it requires very little experience to show how little we can judge from mere outward appearances, although no doubt it generally happens that circumstances are capable of leading to a correct and certain decision.

Direct evidence.

Capable of being rebutted.

Partaking of both kinds of evidence, the habits of the party are oftentimes very significant; but these, of course, are only so, taken in connection with facts as that which may be conclusive of a particular intention in the habits of one person may not be so in those of another. It is not necessary to look very deeply into the subject to see this. There are not wanting instances where persons having gained wealth in the morning of their lives, have thenceforth (being without incumbrance, or if not, of a vagrant turn), moved from place to place, and from country to country, doing acts and expressing intentions in each,

Habits of a party in connection with facts.

CHAP. V.

amply sufficient, without more, to give them a domicil in each; and yet of course, such habit being known, would render any evidence with respect to them of a very different character than in an ordinary case, and hence the evidence direct depends very much upon the indirect and circumstantial.

Direct evidence dependant.

As it is one of the governing principles in this branch of the law that there must be an abandonment before there can be an acquirement, it follows, that the residence in both cases must be very distinct; and the fact of property or affairs left undisposed of or unsettled is of importance in doubtful cases, although even here such a fact is capable of being explained, and it may be shown that a conversion or transmission would have taken place and was intended, had it not been for such and such things, &c.; and these attendant circumstances will determine its weight, and therefore the unsold or unsettled state of property or affairs in a foreign country where a domicil has been abandoned, will not be sufficient of itself to revest it; but the evidence as to the acquirement of another will, of course, very much affect the question of abandonment. Evidence of intention is only material where the circumstances attending the residence leave the matter in some degree of doubt; for if there be a sufficient case to show the fact, the intention may almost be presumed, or at all events is almost inseparable from it.

Unsettled affairs in a foreign country

Alterant circumstances.

Before concluding this part of the subject, I will refer to a case, illustrative of the views taken by the courts of justice in America, of the evidence necessary to show the abandonment or acquirement of domicil. A somewhat recent case of *Cole* v. *The Inhabitants of Cheshire*, was determined in the Supreme Judicial Court of Massachusetts, and is reported in 1 Gray (*Amer. Rep.*) 441. In that case the evidence of domicil was only incidentally considered; but the observations of *Judge Thomas* are so much to the point that I shall quote them as far as is necessary, without apology. "It was not difficult," he said, "to prove that a party came to a particular place before a particular time, and brought luggage, and made a contract for board and lodging; but the effects

American law of abandonment and acquirement.

of these acts depended upon the intent and purpose with which they were done. If the intent and purpose was to do work on a particular farm, during the summer and autumn, and return to his family residence and home the ensuing winter, the facts proved would avail the party nothing" (speaking of the party wishing to prove a newly acquired domicil). "Qualified by such intent and purpose, they were perfectly consistent with the intention of retaining his domicil in Cheshire (his family residence), and would not only fail to show a change of domicil, but they would exclude the conclusion. The plaintiff must prove that he left Cheshire with the intent of abandoning his old domicil and of acquiring a new one; the intent was manifested by what he did, and by what he said, when doing was sometimes rendered as significant by what he omitted to do or say. In the negotiation (for his board and lodging), he stated that his purpose was not to live with his father after his time was out, and this negotiation with the declaration of purpose and intent, which not so much accompanied as made part of it, was a fact competent to be proved. Whether the negotiation was successful, whether it ripened into a contract or not, might affect the weight, but not the competency, of the evidence; such declarations were within the strictest rule, proof of the *res gestæ* qualifying to give a character to the principal thing done. The sum of the whole matter simply was, that to prove his intent to leave his old domicil, the party was permitted to show that he had been in negotiation for a new one, with the avowed purpose of abandoning the old. It was open to the defendants to show that it was collusive and a sham; but if real and in good faith, that furnished the kind of evidence of which the case was in its nature susceptible; and which, uncontrolled, was satisfactory. It was competent to the plaintiff with a view to show that the purpose he had formed of abandoning his domicil in Cheshire, had been carried into effect, to prove that his domicil still continued in the other place (to which he had removed), and to exclude any inference that he had gone there for a temporary object, and with the intent to

CHAP. V.

turn after the object had been attained. To this end he must show that he held an office in his new domicil, *or had engaged in any pursuit or calling indicating* the design and purpose of making it a place of permanent residence."

It is unnecessary to enter into the details of this case, the object of the plaintiff, however, was, to escape being taxed, according to the American law, by showing that he had acquired a new domicil, had been appointed to an office and taken up his abode in a lodging, where he had negotiated for his board and the keep of his horse for a certain sum, and it was held that he had acquired such domicil. It appears hence, and from other cases decided in the American courts, that both abandonment of old domicils and acquirement of new ones are matters of much easier accomplishment in America than in this country, or even in France; and this is somewhat surprising, considering the vagrant habits consequent upon the state of society in so large a continent, where the choice and accomplishment of change is so comparatively easy; but the general observations apply equally to the necessary evidence as the subject is viewed by our law.

Difference of American law.

CHAPTER VI.

OF COMPULSORY DOMICIL—DOMICIL GENERALLY AT THE WILL OF THE PARTY—WHERE DEPENDANT BEST DESIGNATED AS COMPULSORY—MINOR—MARRIED WOMAN—MINOR RESUMED—IMPOSSIBILITY OF NO DOMICIL—LEGITIMACY—FRENCH DISTINCTION BETWEEN BIRTH AND DOMICIL—DOMICIL OF MOTHER—MATRIMONIAL ENGAGEMENT—SCOTCH LAW—TEMPORARY DOMICIL—COMPARISON BETWEEN ENGLISH AND SCOTCH LAW — CASES ON THE QUESTION OF A MARRIED WOMAN'S DOMICIL—JURISDICTION—SERVANT—DIFFERENT KINDS—OF THE CROWN—OF A PUBLIC BODY—INFANT—BIRTH AT SEA—IN PORT—DOMESTIC SERVANT—APPRENTICE—PRISONER—EXILE—FOR LIFE OR FOR A TERM—IMPRISONMENT IN A COLONY OF TRANSPORTATION—EXILE NOT OF ENGLISH APPLICATION — STUDENT — EMIGRANT — LUNATIC — ECCLESIASTIC — CURATE—BENEFICED CLERGYMAN—BISHOP.

Involuntary domicil.

DOMICIL, generally speaking, is entirely constituted by the will of the party, influenced, of course, by circumstances; but there are several kinds of domicil in which the will of the individual takes no part, and these are known in our law as necessary domicils, but I think would be much more properly expressed by the word "compulsory," or perhaps in a more general sense, as "involuntary." Thus all persons who have not, legally speaking, an independent existence, come within this category, and follow the domicil of those who are, for the time, the ruling power, to whom they are appendant, and whose legal rights regulate and control those who are dependant upon them. This applies to individuals as well as to states, for a wife has as little legal power alone and without her husband as a prisoner has, independently of the Government by whom he is held in a

Different kinds.

state of captivity; and an infant can no more be legally responsible, or act in a manner that shall be binding upon himself and upon those with whom he contracts, than an exile can return to the country from whence he is banished and regain the rights of a subject, whilst his sentence of banishment continues unrevoked. A minor is incapable during his minority of changing his domicil; but if his parents acquire a new domicil, that of the minor follows theirs; and therefore both these domicils are, so far as the minor is concerned, compulsory; if the parent dies, leaving an infant child who also dies under age, there can be no doubt upon this principle, that whatever actual changes of residence may have taken place in the case of the minor, the last domicil of the parent still continues his, and is his, in respect to whatever property he may leave behind him.

An infant.

A married woman.

A married woman follows the domicil of her husband, and during coverture, is likewise, I apprehend, unable to acquire a new domicil, independent of him, however she may actually remove from place to place; and therefore supposing that both husband and wife should die at the same moment, the domicil of the husband at that instant would be the domicil of both; *Warrender* v. *Warrender*, 3 Bligh. 89, 103-4; but the residence of the wife will sometimes fix the domicil of the husband.

A natural child.

A natural child follows the domicil of its mother, *ejus qui justum patrem non habet prima origo a matre*. *Pothier*, *Pand.* lib. 50, tit. 1, n. 3. It has been held by the American courts, not only that a minor having the domicil (there called settlement, but in this instance meaning the same thing) of its deceased father, does not lose it, but does not gain the settlement of the mother, even if she should acquire a new one by a second marriage; and this is another proof, if one were wanting, of the compulsory nature of an infant's domicil; *Winthrop* v. *The Inhabitants of Waltham*, Cush 8, 327; but see *Arnott* v. *Groom*, 9 Dec. of Court of Sess. 2 Ser. 142, *infra*. In the American case it is supposed that there may arise such a state of circumstances, as that a person may have no settlement, as it is there

A minor.

called; but supposing that could be so with respect to a settlement according to the American law, it is very difficult to suppose that it could be so in regard to a domicil according to our law; for I consider it scarcely to be in the nature of things, according to the present state of the law, that a man should be without a domicil. The way in which the matter is treated is this: It is said that a legitimate child takes and follows the settlement of its father, if he has one; but, if *he has none*, then the settlement of the mother. It is the more difficult to suppose that a person may have no domicil; because it is also quite inconsistent with the general rule in this particular as to father and child, for a child always follows the domicil of the father, and the father, if he gain no other, must have a domicil *originis aut nativitatis*, which the child would follow; and therefore neither father nor child can be without a domicil.

Impossibility of no domicil.

The French law draws a distinction between birth and domicil, when it declares in the 76th article of the *Code*, that, "In the act of marriage shall be set forth the Christian names, profession, place of birth, and *domicil* of the married persons." But this is not inconsistent with the existence of a domicil of birth, which is a kind of *pis aller*, and may, through unnumbered changes of condition, be at last the only resort. In fact, this article of the Code refers probably to the presumption that when parties are of age to contract a marriage, one or both has gained a domicil for himself or herself quite independent of the *domicilium originis aut nativitatis*. The French law as to birth is very similar to our modern law, requiring a register to be entered of the fact, with the names of the parents, &c., and if the birth take place on board of ship, the entry is made immediately it arrives in port, with the domicil of the parents, and this word occurs in almost every article relating to this subject; although I must admit it has a wider signification than with us. There is the same thing with respect to marriage; and the distinction is constantly preserved between domicil and birth. In the 79th article of the *Code Civile* it is provided that the act (or registry) of death shall contain, as far as can be

French legal distinction between birth and domicil.

French registry.

CHAP. VI.

ascertained, the Christian names, surnames, profession, and domicil of the father and mother of the deceased, and the place of birth. Now from these examples it appears evident that the word "domicil," although used, no doubt, in the French in the same sense as in the English language, has still in France also a much more general signification, and means literally a mere place of residence; but in the 81st article the word is used in the more limited meaning; for it is there declared that where a person shall die by a violent death, all possible information shall be obtained of the age, profession, place of birth, and domicil of the deceased; whereas, in the other articles of the *Code* the domicil of the parents is referred to, and not of the child.

The word "domicil" of wider signification in France.

A singular, and, as it was considered by the judges who decided it, a most difficult case was brought before the Scotch courts upon the subject of the domicil of a minor, which I shall here consider. It is the case of *Arnott* v. *Groom*, 9 Dec. of Court of Sess., 2nd series, p. 142, referred to above. The facts were these: Jane Stewart was born in India, her father (a Scotchman by birth) having died in India in the service of the East India Company. On her father's death her mother brought her (in her infancy) to Scotland, and they resided in that country for fourteen years. Being at this time fifteen years old she went with her mother to the continent, where she resided for two years. She then returned to Scotland, remained there for two months, then went to England, where she lived for three years, and then died there, having attained her majority, and being engaged to be married to a merchant of Bristol. After she left Scotland the first time, she never had any permanent residence, but resided in furnished lodgings and at hotels, and sometimes with friends; but when on the continent and in England her mother retained undisposed of the furniture which she had in her house in Scotland. Under these circumstances it was held that she had gained a Scotch domicil, before leaving that country for the first time (after residing there for fourteen years), and that this domicil remained her domicil to her death, and had never been lost

Domicil of a minor in Scotland.

Marriage engagement.

by the acquisition of a new one, *animo et facto*, in England, notwithstanding her residence there, and notwithstanding that she was under an engagement to be married to a gentleman resident in England a considerable time before she died. The *Lord Ordinary's* judgment has a note appended to it, in which he observes that, "Miss Stewart never had any residence separate from her mother, who was domiciled in Scotland, and left her furniture there when she went elsewhere. Had she died in pupillarity (under age), and before she was capable of exercising the right of choosing a place of residence, *her mother's domicil must have been hers*. She did not choose to live apart from her mother, and had she died in June or July, 1839, (having actually died in 1841), her domicil clearly would have been Scotch." A domicil once fixed cannot be lost until a new and different one be acquired *animo et facto*, and no such domicil was acquired by mere living in England. It was said that she was engaged to be married, and therefore it must be assumed that her intention was, when married, to reside permanently in England; but *until actual marriage*, when the domicil of the wife merges in that of the husband, there seemed no authority for holding that a mere promise to marry could alter the domicil, whatever probable effect it might have on the future prospects of the party. (Burge, on "Foreign and Colonial Law," 1—35.) It is a settled rule that the intention to change a domicil is never to be presumed. "Pothier's Introduc. aux Coutumes," §§ 9 & 15; and *Lord Fullerton* observed that, "It was true India was her domicil of origin, but her only home was that of her mother, and as her mother's domicil was Scotch so was hers." In considering the question of the domicil of a minor, the case either of both parents being alive, or of an illegitimate child, has been considered, in the one case, the minor following the father's domicil, in the other the mother's; but in the case just referred to, neither of those elements was to be found, and it was acknowledged that much difficulty was thereby created. The minor born in wedlock has that domicil which is that of its father at the time of its

Loss of one domicil and acquirement of another.

Intention to change a domicil is not presumed.

CHAP. VI.

Domicil of a minor is of origin or birth.

birth; it is therefore at once the *domicilium patris originis aut nativitatis;* and there can be no doubt that, if both parents died *durante minoritate*, that domicil would remain the domicil of the minor until he or she attained his or her majority. If one parent survived, supposing that parent to be the father, no question would arise, because he has an independent domicil; and though he may constantly change it, yet it is within his own absolute control to do so; but suppose he pre-decease his wife, her domicil, which was before compulsory, or not of choice, becomes at once independent, and she can acquire a new one, and in that respect, as a *feme sole*, stands in precisely the same position as a man.

Wife's domicil independent by survivorship.

The only question, then, which could arise in a case like that of *Arnott* v. *Groom*, was, whether the minor once having acquired a domicil *originis et patris*, could lose that *domicil, durante minoritate*, by the change of the domicil of the surviving parent, it being certain that either parent who survives has the power of acquiring a new domicil. It was held, as we have seen, that such loss could occur, thereby laying down the rule that a minor can have two domicils in succession, one of each parent, irrespective of the question of following the changes of domicil of each, which is a part of the ordinary law pertaining to the condition of minority. In the absence of authority it would certainly have been a bold thing for any text writer to lay down such a rule; but being laid down, I think it is very consonant with common sense and equity, having regard to the general principles governing this branch of British law.

Loss of domicil of origin during minority.

I am supported in my doubts as to the conclusiveness of the decision in *Arnott* v. *Groom* referred to, *ante*, p. 199, by the fact that that able judge *Lord Jeffery* differed from his learned coadjutors, and made some most striking observations upon the reasons for such difference. He regarded the case as one of great nicety, inasmuch as it involved the fact of matrimonial engagement; an intention *in futuro* "coupled with actual residence." "We are all agreed," he said, "that to constitute a domicil there must be the fact

Intention and fact insufficient.

of residence at the time of the death and also a purpose on the part of the defunct to have continued that residence. . . . . Where both concur, nothing else is necessary; these are essential requisites, but they are the whole. Now, we have both requisites here. It is said to be quite clear that the lady must be held to have a Scotch domicil at least up to the date of her engagement with the future English husband, or at least up to the time when she went last to England in 1839. *I am not entirely of that opinion*, that domicil was not that of choice, nor was it that of birth; it was the derivative domicil chosen by her mother, and I am quite clear that such a domicil may be renounced with greater facility than that of birth or individual election; for it is that domicil impressed by the choice of a legal guardian. Consider how absurdly early the pupillarity of females expires in this country, viz. at twelve years of age. It is hardly to be thought that this lady, as soon as she became a *minor pubes*, would assert an opinion upon the subject. Her domicil was no longer necessarily that of her mother, which I rather think continued to be Scotch, and the two can no longer be looked upon as the same or as the mother having the power to create the domicil for her daughter. They were only two friends living voluntarily together, independent of one another, and there might have been a radical diversity in the *animus* of each. Suppose the daughter should have indicated a wish to live out of Scotland, and the mother, seeing that, should break up her establishment, I have very little hesitation in saying that the short residence in Scotland after she came of age would not be held as indicative of her intention to make that country her domicil of choice. *I cannot admit what Lord Fullerton assumes to be the rule, that in order to make a domicil it is necessary to have some particular spot within the territory of a law, that is, it is not enough that the party shall have an apparently continual residence there, but shall actually have a particular spot, or remain fixed in some permanent establishment.* In considering the *indiciæ* of domicil, these things are impor-

Time of majority in Scotland.

CHAP. VI.

tant, *but they are not necessary as matters of general law to create a domicil.* Many old bachelors never have a house they can call their own; there was the case of a nobleman who always lived at inns, and would have no servants but waiters, *but he did not lose his domicil on that account.* If the purpose of remaining in the territory be clearly proved *aliter*, a particular house is not necessary. Suppose a person like *Dr. Munroe*, (*Munroe* v. *Douglas*, 5 Mad. 379), but not having maladies making it hazardous for him to live in his native country, had proposed purchasing a property in the Highlands, and comes home from India without the least intention of returning, pays a visit to the north, and sends notice to have his house put in order, he dies before getting home, could it be doubted that he had acquired his Scotch domicil? * He comes back to Scotland, the country beneath the shade of whose law and within whose bosom he means to die. The purpose of marriage was a serious purpose, it is on the record, and I am not moved by the fact that the marriage might be broken off. The fact is, it was not broken off. Is this purpose not an inducement to change the domicil, though probably the engagement might have been disregarded, especially if there was delay between courtship and marriage. The case which illustrates best the ground on which I go is the case of a person having received an appointment of honour and emolument of a settled and permanent nature in another country, and requiring a residence in that country, but dying before being formally inducted into it or entering upon its duties. Take the case of a person in orders who, receiving presentation to a living in England, sells off his furniture and house here (Scotland), and moves to the south. A certain interval must happen before he can be inducted into his living. He goes to England, spends several months *animus remanendi*, looking forward to his marriage with the church as the consummation of his felicity, and with the intention of dying

Purpose of remaining in a territory *aliter* sufficient.

Death before entering on an appointment abroad or a living.

* But, see upon this point the case of *Attorney-General* v *Dunn*, 6 M. & W. 511, where a contrary opinion is expressed.

at a mature old age in the land of his adoption. But, the ceremony is not performed, and he dies before it can be. I ask if that person shall not be held to have died domiciled in England. The statement of *Pothier* is express that if a party changes his domicil in consequence of permanent employment, the new domicil attaches to him the moment he comes into the new territory; I think the present case is just like such a spiritual betrothal."

Acquirement of a domicil by a permanent employment.

It must be admitted that this case (*Arnott* v. *Groom*) was a most singular case, involving elements which rendered a decision upon it a matter of great difficulty; and never, I suppose, was the rule of the necessity of the *animus et factum* put to so severe a test. The party, by the law of Scotland, which releases females from what is called the state of pupillarity at twelve, and males at fourteen years of age, was, *sui juris*, to retain or change her domicil as she pleased, and she certainly, by her marriage engagement, made a great advance (though unconsciously) towards doing so; but upon the decisions upon this subject, it is, I think, clear that it was an advance only and not a selection, a contract without taking possession; and although *Lord Fullerton's* observations were just as to the total uncertainty of the fulfilling of the marriage engagement, yet they appear unnecessary to support the decision come to, for it rested entirely on the ground that anything short of actual permanent residence, coupled with the intention to make it so, could not have changed Miss Stewart's domicil from Scotch to English, assuming that her domicil of origin was lost, and that she acquired that of her only surviving parent. This was another difficulty, if not the chief one in the case, and is a somewhat new feature in the law in that respect. Such a case must, of course, often happen, where a woman becomes widowed with a young family, and is obliged, perhaps, on that very account, to leave her native country and seek under other skies the means of supporting and educating her children upon a scale of reduced expenditure. She would of course, as an independent person, as a *feme sole*, if she permanently resided in that other country, change

Time of the majority of males and females in Scotland.

CHAP. VI.

Domicil of children upon the death of the father, leaving a widow.

her domicil and become domiciled there; and hence it seems quite in consonance with reason that such domicil should be imputed to the children as much as if their father were living and had pursued the same course, for at no time could they follow the domicil of more than one parent, and the act of God has only shifted the power to control the domicil of the *minores* from one natural guardian to another. With regard to the observations made and the cases put by *Lord Jeffery*, they are assuredly very powerful and ingenious, but upon examination they seem rather to go to what his notion of the law of domicil is, or should be, than to what it is. I take the rule laid down by all the cases upon this subject to be express, that there must be an actual taking possession, without which no intention, however strong, can prevail; no, not even the starting upon the journey to take possession, for that is the very dying *in itinere*, so often discussed, and which starting for the intended destination has been held not to operate as a total abandonment of the last domicil. If we look at it in this view, it is an answer to all the cases he puts. Suppose in the case of *Munroe* v. *Douglas*, above referred to, *Dr. Munroe* had purchased a house in Scotland, but died before he took possession, the very element to constitute the new domicil, namely, the taking possession, would be wanting; and so of the other cases. The question is, not the *losing* a domicil, but acquiring one; and if we do not acquire, we cannot lose, and as every one has at least a domicil of origin, that becomes his domicil at last, in the absence of all others. Two points then are established by this remarkable case: first, that a *minor* on the death of one parent follows the domicil of the other; and next, that an intention, expressed by some act to reside in another country, unless it be coupled with residence in some particular spot of a permanent nature, does not, on that minor coming of age, operate as the acquirement of a new one; vid. *Robins* v. *Paxton*, 6 W. R. 157. I have in a previous part of this chapter adverted to the general law as applicable to a married woman, to which I would now revert for the purpose of inserting some most valuable observations made by two learned Scotch judges upon this subject. The case which

Law as to married women.

gave rise to these was that of *Ringer* v. *Churchill*, which occurred in June, 1840, and is reported in the "Decisions of the Court of Session," 2nd series, vol. ii. p. 307, *et seq.*; and they are the more valuable as they were corrected before being printed by the judges themselves. The circumstances of the case appear in the following extract. *Lord Justice Clerk* said, "The facts of the case are shortly these:—Both the pursuer and defender are natives of England, where they were married and resided for some years afterwards. In 1822, as it is alleged, the defender Mrs. Ringer left her husband, went abroad, and has been guilty of adultery, especially at Antwerp, in Belgium. The pursuer came to Scotland in 1838, and after he had resided there above forty days, he instituted the present action for the purpose of dissolving the marriage on the ground of adultery, and the defender was fully certiorated (certified) of this proceeding, a copy of the summons having been communicated to her personally while residing abroad. Appearance has been made for her in the action, and defences have been lodged, which in pointed terms deny the allegations of the summons, and maintain that the defender not having been guilty of the crime of adultery, there is no ground for instituting a process of divorce. A proof having been allowed by which the pursuer alleges that the guilt of the defender is established to have taken place at Antwerp, *Lord Fullerton* as *Lord Ordinary* in the cause took the case to report in consequence of the objection having been raised in another case then depending in the court. His lordship reported the cause on the question of the competency of the action under such circumstances, and the point was ordered to be argued before the whole court. The pleas maintained by the defender were, first, that the court had no jurisdiction to give a decree in the action in respect that the defender was not duly domiciled there (Scotland), at the date of the action, and was not personally cited. Secondly, that even assuming her domicil in respect of her husband, still it being merely fictitious, decree of divorce could not be given on account of acts committed in a foreign country. His lordship

Scotch 40 days domicil.

CHAP. VI.

said, "In considering whether both or either of these propositions are well founded, as they involve the validity of the domicil referred to by both parties in this case, I feel it to be necessary to keep in view what the rule of law is in regard to the domicil of a wife. I cannot then entertain any doubt that the *dictum* of *Lord Stair* authoritatively settles the point, as in treating of the relation of husband and wife he expresses himself in these plain words, 'her abode and domicil followeth his;' and were anything else required in confirmation of this unequivocal expression, we see it very recently recognised in the clear opinions delivered in the House of Lords in the case of Warrender. It is no doubt perfectly true that in that case, reference was particularly made to the settled and permanent domicil of the party pursuer, as a landed proprietor residing in Scotland; but the opinion of *Lord Stair* is expressed without any qualification as to whether the husband's domicil is permanent or temporary, when he states that the wife's domicil follows his, and in the cases of *Forbes & Levett*, where the domicil was objected to as merely temporary, (Fergusson, p. 422), *Lord Pitmilly*, whilst deciding against any inquiry into the domicil of the pursuer, observed that in these two cases the pursuers were wives, whose domicil, except in the case of a regular separation, follows that of the husband. And no case has decided in reference to a domicil constituted by a residence of forty days and upwards within the territory of Scotland, that the domicil of a husband is not also to be held as that of his wife, or that she is to be considered as domiciled elsewhere and apart from him. If her domicil follows that of her husband, it seems equally the same whether his domicil is temporary or permanent; and it has been shown that the rule has been declared in every case to apply *only* to the domicil of the husband which fixes his succession. The domicil of the wife, though in the view of law held to be that of the husband, does not, however, avoid the necessity in such an action, of making her fully apprised of the proceedings instituted against her, if she happens to be beyond the territory in which her husband has acquired

Domicil of a wife.

Notice necessary to the wife if living separate.

a legal domicil." His lordship then referred to the question whether the defender had had sufficient citation or notice of the action of divorce, and stated *Lord Brougham's* opinion in the case of *Warrender* v. *Warrender* (2 Cl. & Fin. 520), that the Scotch courts have jurisdiction in divorce, in a case where a formal domicil has been acquired by temporary residence, without regard to the native country of the parties, the place of the ordinary residence, or the country where the marriage may have been had.

Temporary residence and place of marriage.

It will be seen that a great portion of this case turned upon the question of jurisdiction, in which the technicalities of the Scotch law make a prominent figure; but the English reader will not fail to have observed one great peculiarity with respect to the light in which the Scotch courts look upon domicil, namely, that for some, and those purely legal purposes, they recognize a species of domicil which the English law does not admit, a domicil very analogous to the fifteen days' residence within a parish or district which enables a party to publish his or her banns there, and which invests a foreigner (not being, I presume, an alien) with the power of suing for some purposes as a domiciled Scotchman in the courts of that Kingdom; and it is likewise remarkable that this power is not a mere phantom or shadow and fiction of law, but goes to a very vital part of it, and one in which it differs most materially from that of other countries, namely, in the law of marriage. If any further illustration were needed after what has been elsewhere adverted to in these pages with respect to the identity of the old word "settlement," and the modern word "domicil," this certainly would serve, I think, as a very strong one; for in both cases of forty days' residence in the territory of Scotland, and fifteen days or three Sundays' residence in a parish or district in England, the sole object is to acquire a particular legal *status, et præterea nihil.* In reference to this it may be as well to insert a few words which fell from *Lord Jeffery* in the case under discussion when he came to deliver his opinion. "I consider," (he says), "that when the word domicil is used

Peculiar species of domicil in Scotland tantamount to a parish settlement in England.

CHAP. VI.

to describe residence of forty days which subjects a man *passivé* to the courts of this country, it is really used in a sense which may be called metaphorical, it certainly is not used in the genuine and appropriate sense to which the well-known definition of the civilians applies: *Locus ubiquisque larem suum posuit sedemque fortunarum suarum; unde cum proficiscitur peregrinare videtur, quo cum revertitur, redire domum.*" In the genuine domicil of a party his proper home is always included; it is where the seat and centre of his family and affairs are habitually placed. It is true that in a certain loose sense, a man may be said to have a domicil wherever he has a residence, and if a party has had a residence in Scotland for forty days, it is now a settled rule of the Scotch law, that he thereby becomes liable to answer in the Scotch courts as if domiciled there.

Definition of the civil law.

It is true that the doctrine is, that the domicil of the husband is the domicil of the wife; but the doctrine rests on the plain and reasonable presumption of fact; it is not a mere arbitrary *dictum* which is to be pushed as far as the mere letter can be carried without reference to its true sense and import; it is a doctrine founded on the presumption generally consistent with truth, certainly derived from regard to conjugal duty; that a wife always ought to be with her family. "Suppose," said Lord Jeffery, "that a married Englishman is sent to Scotland along with his regiment or as a commissioner appointed to conduct some public inquiry, as soon as he has been for forty days in Scotland he would become amenable to our jurisdiction; but, if his wife was left behind in England where his family is, and where his proper home *ex hypothesi* continues to be, can it be held that she is thereby also amenable to the jurisdiction of this court? Notwithstanding the strict nicety of the *societas vitæ* implied in the state of matrimony, in the eye of the law, I cannot see any ground whatever for holding that she would be bound to answer in our courts. Her *forum* remains the *forum* of her husband's proper domicil, and in the case now supposed the domicil never has been elsewhere than in Eng-

land." His lordship was therefore of opinion that there was no jurisdiction in the Scotch courts. *Lord Cockburn* concurred in this, but *Lord Meadowbank* thought that there was; but in the *minority*. *Lord Medwyn* expressed himself to the effect that *Lord Stair's* opinion was only meant to apply to a proper domicil, not a temporary one, and that there was no jurisdiction; and *Lord Moncrieff* concurred, observing that, in the case of *Colquhoun;* "Faculty," Coll. clv. vol. xiii., 347; "Morrison's Dict. App. Husband and Wife," No. 5, it was held that the husband was entitled to fix an abode for his wife *different* from his, but even when he did so that he did not thereby change her legal domicil; but his own proper permanent *home* remained in law her domicil, *because it was his.* But as the rule holds good only with respect to the proper and permanent domicil of the husband, the result is that a husband by gaining a temporary domicil of forty days does not thereby make that the domicil of his wife. A domicil of forty days has no *animus remanendi*. *Lord Cuninghame* considered that the conjugal rights of spouses, and the legitimate conditions and rights of children, are not fit subjects of cognizance in a foreign court, but are peculiarly appropriated to the courts of the country where the marriage, and where the parties permanently reside and carry on their business. In this *Lord Murray* concurred, and therefore the majority of the Court were against the proposition of there being jurisdiction. I have gone thus at length into this case of *Ringer* v. *Churchill*, not by reason of the question of jurisdiction, barely as such, but because it has, as I conceive, a most important connection with the question of a wife's domicil, and all the observations that I have quoted bear, in some degree, upon that question; as do the following cases, the whole law on the point being collected in the last; *Reid, M'Call, & Co.*, v. *Douglas*, 11th June, 1814; 17 "Fac dec." 643; see also *Forrester* v. *Watson*, Dec. Court of Sess., vol. vi., 2nd series, 1358; *Grant* v. *Peddie*, 1 W. & S. 716; *Pirie* v. *Lunan*, Morrison, 4594; *French* v. *Pilcher*, ibid. app. *forum competens*, No. 1; *Wych* v. *Blount*, ibid. app. No. 2; *Alison* v. *Catley*, 1 Dunlop,

Husband's "proper home" domicil of wife.

CHAP. VI.

1025; *Yelverton* v. *Yelverton*, 1 Smith & Sew. Div. Cas. 49; *Dolphin* v. *Robins*, 7 Ho. of Lds. 390. The first case of *Forrester* v. *Watson* has reference to the jurisdiction of the Scotch courts in the case of temporary domicil of a husband in Scotland where the wife after separation had obtained a domicil, and been sued for adultery committed in Scotland.

Temporary Scotch domicil after separation.

Servant.

The case of a servant involves another species of compulsory or involuntary domicil: and the same question has often arisen, whether servants of the Crown or of some large public body holding official situations in various parts of the world, came within this category; and the tenure again upon which they held their positions was also an important element in the consideration. This applies chiefly to the case of officers both naval and military upon half-pay, both in the service of the Government and of the East India Company. The case of *Cockerell* v. *Cockerell*, 4 W. R., p. 730, which I have referred to upon this subject in another part of these pages, laid down the law distinctly, that the mere continued receipt of half-pay, where other circumstances went to constitute an acquired domicil other than that of origin, was not sufficient either to form a compulsory domicil in another country, or to prevent the acquirement there of a domicil of choice. In the case of *The Commissioners of Inland Revenue* v. *Gordon's executors*, Dec. of Court of Sess., vol. xii., p. 657, Mr. Gordon, a native of Scotland, entered the English navy in 1813, at the age of thirteen, and was engaged in active service till the year 1822, when he retired on half-pay. After his retirement he resided in lodgings in Jersey, till 1834, when he went to reside at Tortola, one of the Virgin Islands, having been appointed a stipendiary magistrate there under the Act for the emancipation of Negro slaves, the provisions of which expired in 1841. He subsequently was appointed president and senior member of the Council of the Virgin Islands, an office to which no salary is attached. In 1839, he got leave of absence and came to Scotland, on a visit to his relations. He married a Scotch lady, and was on his return with her to Tortola, when he died at St. Kitts, in June, 1840. Mr. Gordon continued

Servant of the Crown.

Naval and military officers.

to receive his half-pay till his death. By the regulations of the service, naval officers on half-pay are required to reside in Great Britain unless they have obtained leave of absence, and they are liable to be called upon for active service at any time after six months' notice in the Gazette. The Crown had claimed legacy duty upon the ground of an English domicil, but upon these facts it was held that Mr. Gordon had acquired a domicil at Tortola, and therefore that his estate was not liable to legacy duty; *vid. Thompson* v. *The Advocate-General*, 13 Sim. 153; 12 Cl. & Fin. 1; 4 Bell App. Cases 1. The wife was also dead, and the *Lord Ordinary* found that her domicil followed that of her husband, and was at Tortola also.

The case of *The Commissioners of Inland Revenue* v. *Gordon's executors*, 12 Dec. C. Sess. 657, is valuable as laying down the following doctrine: that it never was originally understood to be doubtful that the numerous functionaries in India and our Colonies effectually acquired domicils by their residence in the discharge of their duties, though it is clear that, but for their appointments they never would have quitted their original home. Even holding the power of the Crown to be as extensive as in this case was assumed, the only effect would be that the Crown had the power to oblige the party to change his domicil which it had at one time authorised him to acquire, and if he died before the power was exercised, and before the change took place, the domicil which he had acquired and which he retained till the moment of his death, must afford the rule for the determination of all questions regarding his personal succession. But it is a mistake to say that the Crown had the power to make the party change his domicil: the order to return might have been issued, but, according to the regulations affecting half-pay, the only consequence of his refusal to obey would have been the forfeiture of his half-pay (*vid. Cockerell* v. *Cockerell*, 4 W. R. 730,) so that in no sense of the term could it be said that the residence abroad was dependant on anything but his own will, though it was likely enough that that will might have been materially

Servants of the Crown in India, &c.

Half-pay.

CHAP. VI.

influenced by his recall. It was generally understood that officers in the latter predicament did not acquire a legal domicil in the quarters to which they might be sent and in which they remained in the performance of their duty; but the principle of the exception was not that the Crown had the power to recall them, but the more important consideration that it had the power to send them there, and that they presumably were there only in obedience to that power. The inference drawn thence was supposed to be, that however long their mere corporeal residence might be in any particular place, the residence is to be ascribed not to any *animus* of theirs but to the *animus* of their military superiors, to which, so long as they continued in the profession, they were bound to yield obedience. There was consequently in such a case a complete separation between the mere *de facto* residence in a particular locality and the *animus* of betaking themselves to that locality, and continuing in it, which last was indispensable to the existence of a domicil in the legal sense of the term; but analogy naturally failed in the most essential particular, when it was attempted to be applied to officers on half-pay. The Crown had no power to determine where they should remove themselves to. In a very recent case of *The Attorney-General* v. *Napier*, 6 Exch. 217 (15th Feb. 1851), a British born subject, an officer on service in her Majesty's army in India, died there intestate, leaving all his property situate in that country, with the exception of a small debt due to him from the War Office in England. His widow took out letters of administration in India, and after paying his debts, &c., invested the rest of the estate in India in her own name for her own benefit and that of the next of kin. She afterwards took out administration in England for the purpose of getting the debt due from the War Office. The Crown then claimed legacy duty on all the property of the intestate in England and India; and it was held that as the deceased was on duty in India in her Majesty's service he did not acquire a domicil in that country, and that the whole of his property, though chiefly situate abroad, was liable to legacy duty. It was likewise held that an officer in the

Distinction between *animus* and residence.

Where the bulk of the property is in India.

service of the East India Company did thereby acquire a domicil in India. This case, therefore, is a confirmation (if any were wanting) of the observations made by *Lord Fullerton* and *Lord Robertson* in the case immediately preceding; and the principles upon which they both proceed are too plain to need explanation. The following cases may likewise be referred to on the same points: *Logan* v. *Fairlie*, 1 Myl. & Cr. 59; *Jackson* v. *Forbes*, 2 Cr. & Jer. 382; *Attorney-General* v. *Jackson*, 8 Bligh. N. S. 15; 2 Cl. & Fin. 148; *In Re Ewing*, 1 Cr. & Jer. 151; *Arnold* v. *Arnold*, 2 Myl. & Cr. 256. I have thus treated of the cases of a wife, and of a servant of the Crown, or of any great body having possessions or jurisdiction in a foreign country, such as the East India Company; for one instance is sufficient to evolve the principle.

An infant.

With regard to the case of a minor or infant, that subject is so fully treated of in the next chapter, under the head "domicil of origin," that it would be but tautology to go into it at length here. I may, however, remark, that the condition of an infant in respect to his domicil, partakes of the character of all disabilities; he can have no legal *status* of his own, except that of origin, and as he is not responsible for any act which would make an adult liable (civilly speaking) unless he clearly adopts it when he has attained twenty-one, so he is dependent upon the *status* of his father for his domicil, and, failing that, his origin is traceable to the country wherein he first draws breath—if on the high seas to that country to which the vessel belongs where he is born, and within cannon shot of the shore to that country off whose shore such vessel is lying, or in a port the limits would extend to the limits of such port.

Birth on shipboard.

Domestic servant.

The case of a domestic servant may be in some degree different from that of a servant of a public governing power, because the tenure is somewhat different. The ordinary tenure of domestics is, that both master and servant may separate from each other with one month's notice, although in the case of agricultural labourers it is

CHAP. VI.

understood that the hiring is for one year (see *Reg.* v. *Twemlow*, 4 W. R. 412; *Lowther* v. *Earl Radnor and Another*, 8 East. 113; referring to the 20 Geo. 2, c. 19 & 31, ibid. c. 11, s. 3). These Acts apply to all labourers generally. The question of domicil upon this head can only arise where servants accompany their masters abroad, a very common case. Knowing the principles which govern the general law of domicil, it is only necessary to apply them to the case under consideration. Now, in every case where the will of the party is not an agent to determine the domicil, we must of necessity look at the power upon which they are dependent, and the domicil of that power becomes that of its subject or servant, and the only thing to refer to then is the duration and nature of the connection between them. As we have seen in the case before us, this is not certain for more than a year in one case, and may not last in the other except *de mense in mensem*. This, be it remembered, is where there are no assisting circumstances to help us in determining the question; for the same *animus* may reside in a servant as in an independent individual, and any expressions or acts forming an *animus* and *factum* would be sufficient, I apprehend, to override the rule of compulsory domicils. Thus, suppose a servant lives for a number of years in a family with whom he has gone to a foreign country, marries there, and has a home and family near the residence of his master, where he resides, only following his service at his master's house during the day, and, having saved and possessing a competence, constantly declares his intention to leave the service whenever his master's family return to England, and to spend the remainder of his days at his chosen home. I think, upon such a state of circumstances, there would be little or no doubt, that if he died in the service his domicil would be in that foreign country, whether his master or mistress had acquired a domicil or not. On the other hand, a servant of an individual holding an office where the original domicil is not lost, in the ordinary course would follow such domicil; and the exception in this case, as in all others, proves the rule. The

Circumstances overruling compulsory domicil.

case of an apprentice can hardly apply to this question, because, generally speaking, he is a minor also; but supposing him of age, he has so little will in his movements that, whilst his indentures remain uncancelled, he must of necessity have the same domicil as his master. The determination of indentures otherwise than by cancellation involves a criminal question, and the apprentice would then come under another head of compulsory domicil, namely, that of a prisoner, of which hereafter. Our law is sadly bare of authorities on these heads, beyond what we find in the text books, and those generally the *dicta* of foreign writers. Thus *Voet*, art. 1, t. v. § 96, has the general proposition that servants follow the domicil of their masters, and the cases do no more than proceed upon the principles which govern the general law, and which I have endeavoured to apply at the outset of these observations. Thus in the case of *Dalhousie* v. *McDouall*, 7 Cl. & Fin. 331, 817, it was held that a servant who follows his master does not thereby lose his domicil of origin; cod. x. 40-7; Cod. Civile, art. 109. The fact is that a servant stands in a very different position to any other person under disability (if his case can indeed be classed with theirs, which is very doubtful) for he has the power, within a limited and time certain at least, to act as he pleases, in respect to his place of abode, whereas they *must* of necessity follow that of others, reside where they reside, and go where they go; moreover this even is not always necessary, for although for the time resident in another place, whether the domicil of their superior or not, their domicil and his still continues to be the same. Thus a slave can have no other domicil but that of his master, whilst he continues in that relation to him. The best instance, perhaps, of compulsory domicil would be that of a prisoner, not because there is any doubt as to his domicil being that of the country in which he is imprisoned, but because he cannot leave it; and this element it is which determines his domicil. I speak now of an *entire* imprisonment, that is during the remainder of his days, for, in this case, the *animus* is taken away from him and transferred to

Apprentice.

A servant's domicil of origin not lost.

A slave.

A prisoner.

CHAP. VI.

that of the power holding him in durance, and the *factum* is represented by the place or locality in which he is imprisoned *Primâ facie*, a prisoner does not lose his domicil of origin merely by the fact of being incarcerated, for it may be, and generally is for a limited time; and it must be presumed that, as soon as the term is over he will avail himself of his freedom to act according to his own will and convenience, and either regain his original domicil or acquire another, as circumstances may render it expedient or possible for him to do.

An exile or convict.

The case of an exile, or in our parlance a transported convict, would be different from the case of a servant travelling with his master, because, although only exiled his native country for a specified term, he might be transported to such a distance, and under such circumstances, as to render it morally impossible, having regard to his age, health, means, &c., that he should ever return. This, I apprehend, would seriously affect the question of his domicil, for the mere *animus revertendi*, however strong, would be entirely neutralized by such a state of things, and I know of no case which goes so far as to decide in direct terms that the domicil of origin in such a case would not be entirely lost: upon principle, I think it would.* Transportation, we know, is often followed by imprisonment also, in the distant colony to which the convict is transported, and in like manner a convict, though transported by sentence, is frequently retained in this country and kept in durance instead; but there is one consideration which is now of considerable importance, as it is a new element in this branch of legislation; namely, the tickets of leave which are so constantly and commonly granted to those under sentence, supposing their conduct has been thought to deserve such a remission of the punishment. This, of course, would very much assist the idea of the existence of the *animus revertendi*, and it would

Tickets of leave.

* Perhaps the increasing facilities of communication with our penal colonies, and the fact that so many now never leave this country *at all*, might greatly modify this proposition.

therefore take strong circumstances to counterbalance its influence, and allow this *animus* to be displaced, and its room filled by the *animus manendi*. In the case of imprisonment in a penal colony, slight provocation, a thing which would otherwise be little more than a fault, is elevated upon the top, as it were, of former transgressions, and the unfortunate being who is transferred to the mines of Port Arthur has little to hope for the future. The word "exile" is not exactly ours, because it rather belongs to the government of an autocracy; but as it is usually for life it has been considered to deprive the party exiled of his domicil of origin; *Denisart, Domiciles*, 3. In the case of *Duncan* v. *Cannan*, 24 L. J. N. S. Chanc. 460, it was laid down in argument and confirmed by the decision of the Court, that questions of personal capacity in cases of minority, coverture, &c., were governed by the law of the actual domicil at the time when any dealing with the property was attempted, and not by that of the contract of acquisition; and this rule has been applied to a wife's equity to a settlement. In all these cases any particular law may by contract be substituted for that which would otherwise govern; Story, "Confl. of Laws," ss. 66, 69, 101, 102, 136, 141; *Gambier* v. *Gambier*, 7 Sim. 263, and 4 L. J. N. S. Ch. 81; *Foubert* v. *Turst*, 1 Bro. P. C. 129; *Lashley* v. *Hogg*, Rob. Pers. Succ. 414, 426; *Gulpratte* v. *Young*, 4 De Gex. & Sm. 217; Frazer, on "Per. and Domest. Relat.," 1—417; *Brandon* v. *Brandon*, 3 Swanst. 312. *Lord Justice Knight Bruce*, in the case above referred to (*Duncan* v. *Cannan*) observed, that the domicil at the time of the contract and at the time of the marriage, might be material, not so the subsequent domicil.

Deprivation of domicil of origin.

Personal capacity governed by the domicil.

Domicil at the time of the contract.

Amongst the cases of compulsory domicil those of a student and an emigrant are usually and not improperly classed. The former of these can hardly be considered as necessary to comment upon, inasmuch as a student can only be such for a very brief period, extending to a year or two at the most, and generally in this country, and even where, as is not uncommon, young men are sent to

Student and emigrant.

CHAP. VI.

Domicil of origin not lost.

foreign seminaries or universities, they do not thereby lose their original domicil, because there must always be the strongest presumption that they will return to their native country when the purpose for which they left it is answered. The case of an emigrant is somewhat different, as of course, a man may leave his native country and settle in another in such a manner as to lose his native domicil and acquire a foreign one; but in the case of enforced emigration, of course the domicil of origin is not thereby necessarily lost. *De Bonneval* v. *De Bonneval*, 1 Curt. Eccl. Rep. 856.

Lunatics or idiots.

The only other case of compulsory domicil is that of a lunatic, which I proceed to consider. Lunatics are of two kinds, those who have always been so, either as idiots or violently insane persons, and those who have suddenly become so. It may be that in the former case, up to a certain point, although totally incapable of managing their affairs persons of weak intellect have still filled some sort of *status*, legally speaking, because there has been no inquisition found respecting them, and I apprehend if any such died,

Not found by inquisition.

without inquisition found, inasmuch as their property could be inherited, the ordinary principles would apply with respect to them, as in the case of a sane person. The moment, however, the law takes cognizance of them, and some person is appointed as a medium to deal with, they are in the same position as any other party under disability, and the domicil of the committee would be theirs, in the same manner as the domicil of a guardian would be that of

Tutor.

his ward, or of a husband that of his wife. The 108th article of the *Code Civile* uses the word *tuteur*, signifying very much the same thing as our *tutor*, that is, one to guard or render the object of his care *safe* (from *tutus*). There is a very early case on this subject, which is referred to in Robertson, on "Personal Succession," pp. 113 and 114, and also in Doctor Phillimore's Treatise on Domicil. This is found in the *Dictionary of Decisions* for 1813, by *Lord Elchies*; art. "Idiotry and Furiosity," No. 2; also, same volume, notes 199, 1749, June 21, where we have the following case:—*George Morison, lunatic, and Walter Bain, and Pene-*

lope, his wife, committee of his estate, and John Hamilton their factor v. *The Earl of Sutherland.* A man by inquisition being found in England lunatic, thereupon a commission of lunacy was given by the Court of Chancery, and the committee of his estate, having suit for the debt owing the lunatic in Scotland; it was objected that a commission by the Lord Chancellor of England out of the Court of Chancery could give no title to sue in Scotland, and the committee, after advising with counsel in England, finding that an idiot's tutor appointed in Scotland could not on that title maintain an action in England, and being therefore doubtful that the law might be found the same in Scotland, applied to the Chancellor for leave to take a letter of attorney for the lunatic, which having got, he insisted on both titles; but the Court found that neither of them was a sufficient title to carry on the suit. Reversed by the House of Lords 13th February, 1750, and the title to give action in the appellant Morison's name. The Chancellor thought the objection to the first suit well founded, and that a committee in England could not sue in Scotland, but that yet the lunatic might sue in his own name, and that though the first suit was brought in the name of the committee, as if a lunatic, which they could not do in Scotland when the suit was afterwards brought in the lunatic's own, which could take no notice of his lunacy unless a brieve (inquisition) had issued (supposing he had been found furious), if they did take notice of it, it could only be as lunatic at large which could not bar a suit in his name, and that the union made no difference, for that the law would be the same in England. At page 199 of the notes is the following:—1st. Inquisition in England is no legal evidence in Scotland. 2ndly. If it was, the *Lord Chancellor* has no power to direct the management of an estate of his in Scotland, because *extra territorium:* answered, that *statuta personalia voce domicilii* must bind everywhere. A lunatic or fatuous person or minor or married person who is held so there must be held so everywhere. Moveables *sequuntur personam*, and are regulated by the law of the place of domicile. Re-

Scotch law as to lunatics.

Not affected by the union.

CHAP. VI.

plied: *statuta* even *personalia* have no force *extra territorium* if it is not *ex comitate*. A man is major (*i.e.* of age) in Naples at eighteen, but if he had an estate in Scotland he could not dispose of it to the second in succession to moveables in Scotland, as ruled by the law of Scotland wherever the owner dies. Witness the case of *Duncan's executors*, same vol., tit. Succession, No. 4, 1738, February 16. The debts must be regulated by the law of the place where they must be sued.

Time of majority in Naples.

Scotch law as to debts.

Not regulated by the domicil.

Duncan's executors was this case. The nearest of kin of Adam Duncan competing the Lords thought that the succession to moveables and debts in Scotland and the office of executor must be regulated by the law of Scotland, and not by the law of the place where the deceased proprietor had his residence and died. They did not decide the point, but Adam Duncan who had his residence forty years in Holland having died there, the commissaries of Edinburgh preferred (as the Scotch term it) James and Ann Duncan, his brother and sister, to the office of executors. His nephews and nieces by other brothers and sisters presented an advocation upon iniquity (that is, put in their claim), for that by the law of Scotland they, *jure representationis*, had an equal right in the succession of the moveables as well as heritage. The Lords refused the bill, reserving to them to be afterwards heard upon their right to the succession of accords, and gave their opinion as above. It will be seen that the above cases refer chiefly to the question of jurisdiction which determines the *domicil*, and there are observations incidentally mingled with the facts and details, clearly showing the light in which a lunatic's *status* was regarded in Scotland. The *Lord Chancellor's* opinion was, that a lunatic might sue in his own name where his committee could not, by reason of the non-extent of the jurisdiction; but this was an enunciation of English law, as evidently appears by the next sentences; for it is stated in express terms that a lunatic found what is called "furious," could not sue; but that if at large, his being lunatic as a mere fact was not sufficient to

Jurisdiction as determining the domicil.

Mere fact of lunacy not sufficient to bar a suit.

bar any suit by him; in other words, as I said at the beginning, the same principles apply to a lunatic before he is legally found so, as apply to a sane person not under any disability; for, in common parlance, we must bring a man within the pale of the law before the law can touch him. There is also a most important sentence at the conclusion of the case, namely, "and that the union made no difference, for that the law would be *the same in England.*" In the same case as set forth in *Lord Elchies'* notes we are favoured with the heads of arguments, after stating the two propositions which he considered as laid down in the case, namely, that inquisition in England was no legal evidence (of lunacy) in Scotland, and secondly, if it was, the *Lord Chancellor* had no power to direct the management of such lunatic's estate in Scotland, because *extra territorium*, that is he had not the jurisdiction. The arguments were these; that the laws relating to personalty in the place of domicil must bind everywhere, and therefore that a lunatic or indeed any person so regarded in the place of his domicil must be taken to fill that character everywhere, and the incidents must follow. The reason given is that moveables *sequuntur personam*, and are regulated by the law of the place of domicil. This was denied on the ground that moveables were regulated by the law of Scotland wherever the owner dies (which might of course include a domicil), and in proof of this the case of *Duncan's executors* given above was referred to, which certainly appears so to decide. It is almost unnecessary to say that this is just the contrary to the law of England, and goes upon the principle that debts must be regulated by the law of the land where they must be recovered. Other instances, perhaps, of domicils *not* of choice, might be adduced, but it is scarcely necessary to refer particularly to them, because, as I have so often said, the principles, once known, we have nothing to do but to apply them. Thus a person having a temporary residence does not lose his domicil of origin or that which he before possessed; whereas the taking up a permanent sojourn immediately confers one, and this applies to clerical as well as

Inquisition in England not evidence of lunacy in Scotland.

Moveables regulated by the domicil.

Difference of Scotch and English law.

A clergyman.

CHAP. VI.

lay persons, and the distinction between a curate and a beneficed clergyman is immediately apparent; a bishop in his palace and a clergyman in his living stand on the same footing, and though each may have translation or further preferment, the domicil acquired is not lost until another be gained, and in all cases where the *sedes* is, there will the domicil be likewise. With regard to those of the clerical profession also, there is this simplifying circumstance, namely, that their movements are usually within the English territory, except in the case of Scotch church as given to English clergymen or *vice versâ* or colonial bishoprics. There, of course, the actual acceptance of the preferment followed by the act of going to and taking possession of it, would, I think there is no doubt, operate as a loss of one domicil and the acquirement of another, and it is no proof of the fallacy of this assertion to say that there is the chance of a further and better piece of preferment, inducing the party immediately to leave the domicil so acquired and obtain perhaps a new one; for in the case supposed there are all the elements necessary, and we look no further, whatever else may take place, to alter the domicil, being in the balance as the uncertain future against the certain present.

Colonial appointments.

Difficulty of dividing the subject.

The chief difficulty which occurs in the divisions of the subject of domicil arises from the manner in which every part of it is mingled with the other; all that can, therefore, be done is, to make that portion of it under discussion the prominent feature, and all the others that necessarily arise in immediate connexion with it subservient and conducive only to illustrate and bring it forward. I look upon domicil of origin and birth to be identical, because no man's legal history can be carried back further than his birth; and the domicil of origin must be coeval with that period, for it is the first he has, and which he must have immediately upon his birth; for even if he happens to be born on shipboard, or on a journey, the moment he comes into existence, his father's domicil becomes his, but if his father be not then living that of his mother. Vide *Somerville* v. *Somerville*, 5 Ves. 750. The only real distinction is, as to the

Domicil of origin and birth identical.

Distinction as to place of birth.

place of birth. *Reg.* v. *Sutton under Brailes*, 25 L. J. M. C. 57. An illegitimate child can, of course, have no father, legally speaking, and, therefore, cannot follow the domicil of its natural father; but as the mother is certain, in spite of the rule, *hares nominis* so far as his domicil of origin is concerned it would be the domicil of the mother.

Bastard.

The French law differs considerably from ours in this respect; for although a child may be born of a single woman, yet if she afterwards marries the natural father, it is possible to render it legitimate by certain forms to be gone through; for the law of France recognizes the possibility, or rather assumes the existence, of an inchoate contract to marry the party at the time of conception. Supposing there be, then, no legal impediment to such marriage, and therefore, if the father or mother at that period be in such a condition that they cannot legally marry, the child then conceived cannot afterwards be legitimatized.

French law.

Inchoate contract assumed

It has been considered that a domicil of origin and birth may be distinct, but it is very difficult to explain wherein this distinction lies, and at all events, when events make it at last obligatory to refer to the first domicil, it matters very little what we denominate it, whether we call it domicil of origin, or domicil of birth. *Patris originem unusquisque sequuntur.* Cod. lit. 10, tit. 31, l. 36. *Code Civile, Art.* 76.

With respect to the question of legitimacy, domicil is a very important matter in the case of individuals who acquire property in a country not that of their birth, and die intestate and unmarried seised of such property. Thus the laws of France and of Scotland legitimatize individuals not born in lawful wedlock, who, according to our acceptation of the term, would be bastards or illegitimate. In the first case this is done by means of certain "acts," as they are called, and in the second by the mere fact of the parents subsequently marrying. According to the laws of these two countries, an *ante natus* is to all intents and for all purposes rendered legitimate, and, amongst the rest, of course, in relation to the title to property either purchased by him or coming from him, and is in fact on the same footing as *post nati*,

Legitimacy.

Ante natus.

CHAP. VI.

if there be any. Nay more, the laws of this country recognise the legitimacy of an *ante natus*, and he is indeed regarded as legitimate all over the world, personally, although the laws in force in England as to the transmission of real estate remain in force as much against him as against any other person born in England of English parents not in lawful wedlock. This is one of the great causes of incapacity to inherit, and no statute which has at present passed has, that I am aware of, in the least altered the general law upon the subject. Thus when a party is designated as "heir," "issue," "ancestor," or any other relation, it must be taken, I apprehend, to mean according to the law of England.

"heir," "issue," "ancestor." now understood.

Ante and *post natus*. Scotch domicil.

A recent case upon this subject *In re Don's Estate*, 5 W. R. 836, fully illustrates this. David Don, a bachelor and a native of and domiciled in Scotland, cohabited with Elizabeth Hogg, a spinster, also a native of and domiciled in Scotland; and a son was born of that connexion. In the course of the next year, the parents married, whereby, according to the law of Scotland, the son, who was named David Don, was rendered legitimate. Years rolled on, and David Don the younger, having come to man's estate, left Scotland, and settled in England at Newcastle-upon-Tyne where he purchased real estate, being land with erections upon it, and part of a street in the town, and, being so possessed, and, for aught that appeared to the contrary, domiciled in England, died intestate and unmarried. David Don the elder, upon the assumption that David Don the younger was his legitimate son, not only according to the law of Scotland but also of England, entered into and possessed such real estate, and continued in possession until the Corporation of Newcastle-upon-Tyne, under the powers of an Act for the improvement of the town, took the land compulsorily. Upon the investigation of the title the dates of birth and marriage of course disclosed the true state of affairs, and the important fact came out that David Don the younger was legitimatized only, and, therefore, according both to the Scotch and English law, not, previously to the marriage of his parents, legitimate, although rendered so by the law

of Scotland, and so far a domiciled Scotchman until he was capable of gaining a domicil of selection. The only mode in which David Don the elder could make out his claim was under the modern English law of inheritance, whereby the father is heir to the son, on the ascending principle; and therefore his title rested on the ground that David Don the younger was his "issue;" but the title being thus considered very questionable, the Corporation of Newcastle paid the purchase-money into court under the provisions of the Lands Clauses Consolidation Act, and upon the usual petition by the land-owner for payment out of court, (in this instance David Don the elder being petitioner) the question was fully discussed. On his behalf it was admitted that he had no title except under the Inheritance Act, 6 & 7 Wm. 4, c. 108, s. 6, but that inasmuch as that Act spoke generally of the "lineal ancestor inheriting from his issue," which David Don the younger undoubtedly was, being recognised as legitimate both by this country and by the law of Scotland, whether he was a domiciled Scotchman or not, it followed that David Don the elder could make a good title to the land. On the other hand, it was contended on behalf of the Crown, that the term "issue" meant "issue capable of inheriting according to law," and that therefore David Don the elder could not be heir to David Don the younger, because although recognised as legitimate for general purposes, he was not so legitimate as that any one could inherit land from him, except his own issue. After a lengthened argument, and judgment reserved, Vice-Chancellor Kindersley, before whom the petition was heard, decided that the petitioner was not entitled to the money representing the land. This learned judge, distinguished alike for the untiring patience as well as for the sound discretion which he extends to every point brought for his decision, entered most elaborately into the consideration of the analogy of the English and Scotch law, and held that, although beyond all doubt in Scotland, an *ante natus*, born of parents domiciled in Scotland, was rendered by the subsequent marriage of those parents legitimate not only in Scotland but

Recognition of *ante natus* in Scotland.

CHAP. VI.

Personal status.

all over the world, still he was legitimate only as to his personal *status*, and not recognised as capable of inheriting real estate in England, nor, as a necessary consequence, could the converse right of land being inherited from him hold good. This was his Honour's view of the question, irrespective of the Inheritance Act; and he was further of opinion that, under that statute the rights were not altered; and the word "issue" meant "issue capable of inheriting according to law." The domicil of all parties was assumed to be in Scotland, and it was not necessary to consider the questions that might have arisen had the domicils been different, and hence the fact of David Don the younger having acquired an English domicil (if he did so) was not discussed. The case was a perfectly new one, and, as might be supposed, every possible authority was brought to bear that could be discovered, into many of which the question of domicil largely entered, and, *inter alia*, an old brief and proceedings in a suit of *Read* v. *Keith* were produced which had been before his Honour when master, the present production of which caused him (as he said) considerable embarrassment. In that case, a Scotchman had emigrated to America, cohabited with a woman, by whom he had two daughters, and afterwards married her, possessed some 200 acres of land in America, where he acquired a domicil, and died there intestate. The land was claimed by the daughters as legitimatized by the subsequent act of marriage; and the question being raised before the master, he had thought them entitled to the land, upon the ground that they were rendered legitimate according to the Scotch law by their parents' subsequent marriage. It did not appear that that decision had ever been called in question, and therefore, certainly, so far, it was an authority. In referring to the production of this case, his Honour said that considering it was the mere decision of a master, (more particularly when it was considered that that master was himself,) he had no hesitation in declaring that it was a wrong decision, and the circumstance of the case did not vary the principle upon which all such cases must go, namely the *lex locis rei sitæ*.

Before concluding this chapter, I may perhaps be permitted to say a few words respecting birth of children at sea, which has given rise to considerable controversy. Vattel, in speaking of this subject, says, at page 102, s. 216: "As to children born at sea, if they are born in those parts of it possessed by their nation, they are born in that country. If in the open sea, there is no reason to make a distinction between them and those who are born in that country; for, naturally, it is our *extraction*, not the place of our birth that gives us rights; and if children are born in a vessel belonging to that nation, they may be reputed as born in its territories, especially when they sail upon a free sea, since the State retains its jurisdiction over those vessels; and as, according to the commonly received custom, this jurisdiction is preserved over those vessels even in parts of the sea subject to a foreign dominion, all the children born in those vessels are considered as born in its territory. For the same reason, those born in a foreign vessel are reputed born in a foreign country, unless their birth take place in a port belonging to their own nation, for the port is more particularly a part of the territory, and the mother, though at the moment on board a foreign vessel, is not on that account out of the country; supposing that she and her husband had not quitted their native country to settle elsewhere." Out of this naturally arises the question what parts of the sea can be said to belong to a country; and the law seems upon that point to be this. There can be no prescriptive right to the open sea. Treaties may affect the rights of certain countries, or there may be rights acquired by tacit agreement, but the only legal right in the sea which any country has is within cannon shot of the coast, no doubt arising out of this consideration, that it is necessary for the purpose of safety that no stranger or foreigner should be allowed to come within that distance. Vattel, s. 289, p. 128. Questions might be made, how far modern improvements in the use of cannon may vary this rule; but still, I imagine the principle would fix it to whatever range the cannon of that country were able to throw a shot. As I have incidentally touched

Birth at sea.

Domicil according to the country to which the vessel belongs

No prescription as to the open sea.

Cannon range

CHAP. VI.

upon the law of France with regard to legitimacy, it will not be out of place here to mention a case bearing strongly upon this point which came before Vice-Chancellor Wood.

In re Wright's Trust, 2 Kay & Johns. 595; 4 W. R. p. 541; 20 Jur. 465. The facts were as follows:—William Wright, in 1821, took the name of Browne, and went to France in 1823 to avoid his creditors; lived with a French woman, and attempted to marry her at St. Omer, but failed in consequence of not bearing his real name, but was married by the minister of the English church there in March 1824. In December of the same year a daughter was born. The marriage was admitted to be ineffectual by the laws of England and France. In 1830, William Wright was called to serve in the National Guard, and got exemption on the ground of being an Englishman. From 1830 till 1854, when he died, he lived in Paris, and never returned to England after 1823, when he left it. In 1836, having paid his creditors, he resumed his own name. In August, 1841, he married the same person according to the rites of the English church; and in November, 1846, at the *Mairie* according to the French law, when the daughter was acknowledged and legitimatized. William Wright, at his death at 1854, left two daughters by a first marriage in England, and the one in France who petitioned for payment to her of half of her father's personalty. The opinions of French *avocats* were taken, but they were conflicting; and Vice-Chancellor Wood held that the domicil of the child followed that of the father. The French law of legitimization went on the assumption of a contract at the time of conception, and that the country in which a child is born does not affect the case, it is the domicil of the parents.

French legitimization.

The domicil of a child the same in England and France.

I may advert to one more case, bearing upon this point, which occurred in the highest tribunal in this country; I mean the case of *Rose* v. *Ross*, 4 Wils. & Shaw 289. The facts were these:—A Scotchman by birth, heir of entail in possession, and proprietor of estates in Scotland, early in life settled in England, making occasional visits to Scotland. By an illicit connexion with an English woman,

he had a son, born in England; and afterwards went to Scotland with the child and its mother, and fifteen days after his arrival in that country he married her. They remained in Scotland two months; visited his estate, and returned to England with the child, where they remained until the death of the father. Upon the question of legitimacy, the Court of Session held, that the child was legitimate; but upon appeal to the House of Lords in this country that decision was reversed, on the ground that the domicil of the father was English (*vid.* p. 292 of the report where the Lord Chancellor concludes his judgment.) The case of *Strathmore* v. *Bowes*, in the appendix of the same volume, p. 89, decides in effect the same point; for there it was assumed that, where a Scotchman has a Scotch domicil, acts done by him in England, which, if done in Scotland would constitute a legal marriage, do make such marriage legal. The question there was as to the legitimacy of a child to inherit a title; and in this, of course, the law of England materially differs, because in Scotland an *ante natus* is legitimatized for *all* purposes, but such legitimization is only recognised in England as to his personal *status*, and supposing the domicil of the parents English, not recognised at all. Now, I apprehend, that a title stands very much on the footing of real estate, for it is transmitted to a man's *heirs*, and a man could not be his father's heir, and therefore, entitled to real estate, unless he was legitimate for *all* purposes according to our law. A very singular case is reported in the "Decisions of the Court of Session," vol. 16, page 6, of *M'Dowall* v. *Dalhousie*, the facts of which were as follows:—A Scotchman, proprietor of land in Scotland, and domiciled there, formed an illicit connexion with B., a Scotchwoman, also domiciled in Scotland; she became pregnant, and in about three months thereafter he was ordered into England on military duty, and she accompanied him, and was delivered of a son in October 1796. He remained for several years resident in England on military duty, but never lost his Scotch domicil, and returned there to reside in 1800; placing B. in a house at Penrith, where he main-

Scotch legitimization.

Acts done in a foreign country affected by the domicil.

A title.

Military duty

CHAP. VI.

Children born in England and a subsequent marriage in Scotland, the parents' domicil being Scotch.

tained and frequently visited her. Several children were born of B. by A. during his residence in England; and in 1808 a formal contract was signed by A. & B. acknowledging themselves husband and wife, and he took her home to his house in Scotland, where they cohabited together as husband and wife, and were universally *habit* and *repute* married persons until her death in 1834. The son born in October, 1796, raised declaration of legitimacy (as is the Scotch term) and of his right to succeed to landed estates in Scotland as heir substitute of entail. Held, first, that a valid marriage had been contracted by the parents in 1808 according to the law of Scotland. Secondly, that as the husband was a domiciled Scotchman, and the marriage was a proper Scotch marriage, it had the effect of legitimatizing the son, *though the place of the son's birth was England, and the principle of legitimatizing per subsequens matrimonium was repudiated by the law of England*; and thirdly, that it was not made out that the mother had lost her Scotch domicil, either before or after the birth of the son; but that *whethe she did so or not*, the legitimacy of the son *was equally established.* To the judgment in this case a note was attached in which the following passage from Voet. lib. XXV., t. 7, s. 6, was quoted: "*Quia nuptiæ per jus finguntur retro cum connubiam contractæ eo tempore quo illa primitus in concubinam assumptu fecit atque ita filius quoque retro legitimus fingitur.*"

Residence on military duty no abandonment.

It will be seen that in this case the difference between the English and Scotch law as to legitimatizing of children is even more strongly exhibited than in the case of Don's estate recently referred to; for there the son was born in Scotland, but in this case the decision was founded upon two other propositions, in which the laws of the two countries are identical, namely, that the domicil of the son and wife follow that of the father, and further that being only resident in England for the purposes of military duty, no abandonment of his Scotch domicil had taken place, although certainly in his case the fact was rendered beyond doubt by his return and settling eventually in Scotland. There is, however, one peculiarity in the third ground of the decision, that the

effect of the subsequent contract or acknowledgment of marriage was to legitimatize the *ante natus*, even supposing her domicil were *not* Scotch, which, as it appears to me, assumes one or both of two things, that the domicil of the father was sufficient to make the son legitimate as being Scotch, or that the acknowledgment of the marriage had such a retrospective effect as to make the domicil of B. follow that of A. even although she was not married to him at the time of the birth of the son. The case was carried on appeal to the House of Lords, and is reported under the title of *Countess Dalhousie* v. *M'Dowall*, 7 Cl. & Fin. 817, and it was held that the child of a Scotchman, though born in England, becomes legitimate for all civil purposes in Scotland by the subsequent marriage of the parents in England if the domicil of the father was and continued then to be Scotch; and that neither the place of the marriage, nor the birth of the child, will, under such circumstances, affect the *status* of the child. In the case of *The Commissioners of Inland Revenue* v. *Gordon's executors*, 12 Dec. of Court of Sessions, 2 Ser. 657, *Lord Fullerton* makes the observation on the general subject of domicil of origin, that though there are *dicta* in some of the cases to the general effect that after the domicil of origin is effaced by a domicil of choice, the latter must be held to remain till a new and different domicil shall be acquired; there is certainly great difficulty in holding that where a domicil of mere choice, which is entirely dependent on the will of the party, is destroyed by a permanent and total removal, such domicil can revive or subsist to any effect whatever, whereas the *domicil of origin* involves an element which is independent of the mere will of the party, and may be held to subsist unless some other has been selected, and continuously preserved till the death of the party.

Place of marriage and birth of child controlled by the domicil of the father.

Difficulty of revival of domicil of choice.

CHAPTER VII.

REVERTER OF THE DOMICIL OF ORIGIN—REVERTER A VEXATA QUESTIO—DEATH IN ITINERE—TWO DOMICILS IMPOSSIBLE—RESIDENCE AND TRADING—DOMICIL NOT LOST BY ABANDONMENT—PROBABILES CONJECTURÆ—DOMICIL OF ORIGIN PREVAILS IN A DOUBTFUL CASE—FACTUM NECESSARY—REVERTER EASIER TO PROVE THAN A NEW DOMICIL—DOMICIL NOT CREATED BY DEATH IN A PARTICULAR PLACE—NO ENTIRE ABANDONMENT UNTIL A NEW ACQUISITION—ANALYZATION OF MUNROE *v.* DOUGLAS—REVIVAL OF ORIGINAL DOMICIL—RESIDENCE DIFFERENT FROM DOMICIL—ANIMUS REMANENDI.

CHAP. VII.

Reverter still a *vexata questio*.

THIS branch of the law of domicil has always been, and now is, to a certain extent, a *vexata questio*, the various cases that have occurred, generally speaking, rendering it unnecessary from some of their circumstances to decide that question, inasmuch as there has usually been discovered some ground for holding that there has not been an abandonment of an acquired domicil, but that a dying either *in itinere* or *in transitu* was sufficient to prevent such abandonment taking effect, although in other respects it was a perfect and absolute abandonment. One of the earlier notices taken of this subject is referred to in the case of *Munroe* v. *Douglas*, 5 Madd. 379, where the case of *Ommaney* v. *Bingham* is adverted to in a note, and it is cited to bring forward the *dictum* that "birth might turn the scale if all the other circumstances were *in equilibrio*;" and *Lord Thurlow* in *Sir Charles Douglas's* case is said to have expressed an opinion that it must be presumed when a man abandons an acquired domicil, he intends to resume his

Presumption of intention to resume a native domicil.

native domicil; but the question then naturally arises, what is the value of such a presumption? and whether it comes within the rule now clearly laid down, that an intention is not sufficient, but that there must be an *acting* upon such intention to acquire a new domicil. Still, however, in the absence of any direct decision on the point, it is necessary to discover, if possible, how the law stands in respect to it.

Act as well as intention necessary.

I have before observed that the assumed necessity of abandonment before a new acquirement would seem to take it for granted that a man cannot have two domicils; but the present opinion of the courts appears to be this: although such a thing is or might be imagined to be possible, yet, so slight a circumstance would turn the scale that the possibility is almost *ipso facto* converted into an impossibility; and the observations of the Master of the Rolls in the case of *Somerville* v. *Somerville*, 5 Ves. 750, go to this, and it is assumed by *Vice-Chancellor Wood* in the case of *Forbes* v. *Forbes*, 1 Kay 341; 2 Weekly Reporter, 253 (where the case is most excellently reported), that (so far as personal property is concerned) a man cannot have two domicils. If this be so, therefore, the question of *reverter* occurs, which might not arise if it were possible that a domicil of origin and an acquired domicil could subsist at the same time. In the case of *Munroe* v. *Douglas* above referred to, this question was very much argued, and the doctrine of reverter insisted on; and it may be useful to analyse those arguments. Dr. Munroe was born in Scotland, went to Calcutta, and was appointed assistant surgeon in a company's regiment. Nearly thirty years after, he married in India, and having resided there for forty-four years he came to England with an intention, as was said, of spending the remainder of his days in Scotland, and evidence was adduced to prove such intention; but *Sir John Leach* thought it insufficient. Dr. Munroe then visited Scotland, and died during such visit, and as his wife (the plaintiff) would obtain a larger share of his property by proving a Scotch domicil than an English or Indian one, a Scotch domicil was the one sought to be established on the ground that the acquired

Two domicils almost impossible.

Analysis of *Munroe* v. *Douglas*.

CHAP. VII.

domicil in India having been abandoned, the domicil of birth, that is, the *forum originis*, revived.

In support of that proposition, numerous cases were referred to. The first was the case of *Bruce* v. *Bruce*, 7 Bro. Parl. Cases, 230; and 2 Bos. & Pull. 230, where Mr. Bruce died in the service of the East India Company; but it was argued that there was a distinction between this which imposed of necessity a local residence, and the case of an officer in the service of the Crown, which it was contended did not constitute a domicil; and a quotation was made from *Vattel* to the effect that "an intention to remain constituted a domicil, whereas, if a man go to a foreign country, *sine animo remanendi*, but merely to raise a fortune, it was not so, it being assumed that there was an intention to return to his original home," *Orde* v. *Orde*, 8 Dec. "Court of Sessions," p. 49. *Vattel*, liv. 1, c. 19, s. 218. With reference to the present state of the law, I apprehend that this is true only so far as a professedly temporary residence is concerned, and cannot apply to the case of carrying on a business or trade; indeed, the very contrary was decided in one of the latest, if not the latest case which has occurred upon this point. The case I refer to is that of *Lyall* v. *Paton*, 4 Weekly Reporter, 798, which, with the preceding case in the same volume, establishes the proposition that a residence and trading constitutes a domicil; for although the trading is not actually referred to, it appears to be assumed, and indeed it is difficult to suppose that a successful trade would not necessarily involve a length of residence sufficient to acquire a new domicil; although, as I have elsewhere observed, length of time is a very indefinite expression, having regard to the decisions on the subject. Another case is *Colville* v. *Lauder*, *Dictionary of Decisions*, 33—34 vols., appendix 9, tit. succession. In that case, a carpenter being a Scotchman by birth, went to the Island of St. Vincent leaving his wife and family at Leith. Four years after, from ill-health, he went to New York, and was drowned in Canada the year after, having written to his father, remitting a sum of money, and stating his intention to return to his

Distinction between local residence, a Government service, and residence for purposes of profits.

Residence and trading form a domicil, not length of time.

Letters stating intention to return.

native country; and it was held that he must be considered at the time of his death as *in transitu* to Scotland, and therefore, supposing this as a recognised case, it would in effect support the doctrine of *reverter;* but this seems quite at variance with the present view taken by the courts, which certainly is, that an acquired domicil is not *lost* by mere abandonment, and that in such a case the acquired domicil would prevail, and, indeed, *Sir John Leach* in the case now under consideration so decided, and therefore, I presume, had the case *Colville* v. *Lauder* now come before the court, the decision would have been in favour of a domicil in the Island of St. Vincent; and it was admitted that such would have been the case had he died there, it being also admitted that he had acquired a domicil there. The case of *Macdonald* v. *Laing* was next cited from the same book ("Dict. of Dec."), p. 4627, which merely went to the point of being in the King's service, not constituting a domicil, a proposition which has never been questioned. The last case upon this point is that of *Cockrell* v. *Cockrell*, 4 W. R. 730; where Mr. Cockrell, the testator in the cause, had amassed a large fortune in India during many years' residence, but had retained his half pay during the whole time, and that was decided on the *probabiles conjecturæ*, or probable presumptions, that the great gain by the business would have prevailed against the forfeiture of the half pay. In continuing the consideration of the case of *Munroe* v. *Douglas*, the next authority cited which I will refer to was the case of *Somerville* v. *Somerville*, where it was decided that the mere place of birth or death does not constitute a domicil; the domicil of origin which arises from birth or succession remains until clearly abandoned, and another taken. In that case, there were two acknowledged domicils—the family seat in Scotland, and a leasehold house in London, but under the circumstances the former was held to prevail. In support of the doctrine of reverter the following passage was cited: *Origine propria neminem posse voluntate, sua eximi manifestum est.* Cod. Lib. 10, tit. 38, s. 4, p. 422, of the Elzevir edition, 5 Mad. 391; but this appears

Acquired domicil not lost by abandonment only.

Half-pay.

Mere place of birth or death no domicil.

CHAP. VII.

Reverter *ipso facto*.

rather to apply to the case of a necessary domicil, or if not, to assume, that if there is such a thing as reverter, the operation is *ipso facto*, and without the intervention of the party himself. *Voet* also is quoted, and the passage there cited clearly refers to a necessary domicil of birth, and goes to show that the domicil of origin would prevail in a doubtful case, which is not at all, I think, in dispute, upon the principle, which is also conceded, that an acknowledged fact remains until the contrary is proved. Comm. ad Pand. lib. 5, tit. 1, pl. 92 at the end. *Pothier* is likewise referred to in support of the same proposition. See *Introduction Générale aux Coutumes*, chap. 1, s. 7, although in the conclusion of the quoted passage, it is distinctly laid down that a change of domicil must be *justifié*, that is, "proved" and carried out by some act before a new one can be acquired. So far, in fact, being a contradiction to the idea of the reverter of a domicil of origin *ipso facto*. The case of *La Virginie*, 5 Robinson's Admiralty Reports, 99, was put forward for the purpose of showing the opinion of *Lord Stowell* (then Sir William Scott) that a reverter was easier to prove than a constitution of a new domicil; but this merely decides that there being in one case a *certain* substratum to build upon, it would prevail in a doubtful case. An unreported case was then cited of *Chiene* v. *Sykes* before *Sir William Grant*, and the reason why it was unreported is obvious, namely, that no decision (except an order being made) was come to upon it. The case was that of a native of Scotland having become a seaman, and although he married at Philadelphia, afterwards coming back to *Crail*, in Scotland, his native place; and jointly with his brother purchased property there and died. Evidence was gone into before the master on a reference to inquire as to his domicil, and the finding being that it was in Scotland, and, it must be supposed, no exceptions taken, a decree was made accordingly, and that case must have proceeded on the footing that there being no other domicil, the domicil of origin still *subsisted*, and therefore this was no decision of a *reverter*. In opposition to the argument that the *forum originis*

Reverter easier to prove than a new domicil.

revived, many cases and text books were produced, not bearing, however, much on the question of reverter, but chiefly that a domicil was not created by death at a place, or intention merely; and the following passage was read from *Denisart, Art. Domicile*, 513: "*Deux choses sont necessaires pour constituer le domicile; 1st. L'habitation réelle; 2nd, La volonté de la fixer au lieu que l'on habite*;" and, therefore, so far a negative argument; and in consonance with what I apprehend to be the present state of the law. It was likewise submitted that an acquired or an original domicil could not be entirely abandoned until another was actually acquired, and that it was not the law that the instant an acquired domicil was quitted the domicil of origin reverted.

Abandonment not sufficient without acquirement.

Upon these citations of cases, and texts of authors, *Sir John Leach* decided in favour of an acquired domicil in India; and it may not, perhaps, be irrelevant in this place to consider certain expressions in this judgment which have been made the ground of argument in favour of intention merely being sufficient to constitute a new domicil, or to let in the domicil of origin. At this distance of time it is difficult to say whether the judgment is a *verbatim* report of what actually fell from the learned judge; the case is otherwise most elaborately and carefully reported, and hence, perhaps, it would not be just to call that fact in question; but, if it is the sense only of what was delivered, that circumstance might account for an apparent inconsistency, attempted, with considerable acumen, to be reconciled by another learned judge now on the bench. The passage is this:—"A domicil cannot be lost by mere abandonment. It is not to be defeated *animo* merely, but *animo et facto*, and necessarily remains until a subsequent domicil be acquired, *unless the party die in itinere toward an intended domicil.*" Now, certainly, this appears to involve a perfect contradiction, that is to say, that a domicil necessarily remained, until a new one was acquired *animo et facto*, unless the party died *in itinere*, towards an intended domicil; that is, unless he did an act which *his Honour* had just said could not constitute a domicil. These words the learned judge last

Consideration of the judgment in *Munroe* v. *Douglas*.

CHAP. VII.

referred to thought applied to the abandonment and not the acquirement. Another view, however, might be taken of them, and perhaps supported by the judgment as a whole. In the subsequent words, his Honour observes upon the fact that the intention to return to Scotland was not supported by the *evidence*, and hence, it may fairly be assumed that, if the evidence had been sufficient, the starting on the journey toward an intended domicil, and that domicil the domicil of origin or birth, might have had the effect of causing such domicil to *revert* (the other and acquired domicil having been abandoned) by starting for another country ; and this is somewhat supported by the fact that the whole judgment seems based upon the *defect of evidence*.

Residence from ill health does not prevent acquisition of the domicil.

Upon the subject of revival of a domicil of origin there was some discussion in the case of *Hoskins* v. *Matthews*, which occurred in January, 1856, before the Lords Justices on Appeal from Vice-Chancellor Wood, 4 W. R. 216; in which a residence abroad from ill-health was considered not to be of such a compulsory nature as to prevent the acquirement of a foreign domicil; but the most important part of the case consisted in an observation of Lord Justice Turner, who, after stating the fact that the domicil of origin being English had been lost, and a new one acquired in Sweden, Spain and Portugal, thought, *there was yet enough to show that this new domicil was again lost, and the original domicil revived.* The case was, that subsequently the testator went to Florence, where he made his will and died, and the Vice-Chancellor decided that his domicil was Tuscan, in which Lord Justice Turner concurred; but Lord Justice Knight Bruce thought that the English domicil remained during the year, when Lord Justice Turner held it had revived, or at all events, that a Tuscan domicil was not acquired; but the opinion of one of their lordships being the same as that of the Vice-Chancellor, the result was that the appeal was dismissed.

Reverter chiefly matter of assumption.

Upon the question of reverter, it therefore appears that much more is assumed than actually laid down or decided;

and the following proposition may now, I think, be taken to be the law upon the point; namely, that a man must *ex necessitate rei* be taken to have some domicil; and, therefore, supposing that during his life he acquires many, and absolutely abandons and loses them, his native domicil, or domicil of origin or birth, will revive; but only in this way, that there must still be some act on the part of the person to complete the intention that it shall revive; but that in the case of a domicil of origin, a slighter degree of evidence is necessary, a slighter degree of *factum* to support such evidence than in the case of any other species of domicil. That a domicil of origin subsists *ipso facto*, whereas any other species must be acquired by some act; and, lastly, that a domicil of origin cannot revive or revert by the mere intention that it shall do so, which is, in fact, a corollary from the first proposition.

Domicil of origin only revives by some act done.

In the case of *MacDaniel* v. *King*, 5 Cushing (American reports), 472—3, the argument was that residence was something different from, and something less than, domicil; if this was so under some circumstances, (was observed by the Court) and in connection with a particular subject, or particular words which might tend to fix its meaning; yet in general, residence and domicil were regarded as nearly equivalent; and there seemed to be no reason for making the distinction. The question of residence or domicil was one of fact, and often a very difficult one; not because the principle upon which it depended was not very clear; but on account of the infinite variety of circumstances bearing upon it, scarcely one of which could be considered as a decisive test. The principle seemed to be well settled, that every person must have a domicil, and he could have *but one domicil* for one purpose; at the same time, it followed of course, that he retained one until he acquired another, and that acquiring another, *eo instanti*, and by that act he lost his next previous one. The actual change of one's residence and the taking up a residence elsewhere, without any intention of returning, is one strong indication of change of domicil. The actual removal of a person from another place

Residence and domicil, how far distinct.

A question of fact.

Acquisition involves loss.

CHAP. VII.

to this, leaving his family therein, but with no intention of returning, was a change of domicil.

Revival of domicil of origin through many changes.

In the case of *Hoskins* v. *Matthews*, also reported in 20 Jur. 110, which I have already mentioned, and shall have occasion hereafter more particularly to refer to, it was laid down, as I have said, as an axiom by Lord Justice Turner, that a domicil of origin after it has been lost, revives more easily than an acquired domicil; thus establishing the position that, whatever domicil a man acquires, or, indeed, whatever number of domicils, if he successively loses them all, the domicil of origin, although lost twenty deep, would revive, supposing it was clear that the party at the time of his death had no other. It might, perhaps, be somewhat difficult to put such a case, but we might easily imagine that the movements of the individual might, from choice or circumstances, be so varied and unsettled from the time of attaining majority until death, as that no domicil whatever was acquired; and this alone would raise such a case as to come within the principle I have adverted to. With regard to the *animus remanendi*, the following remarks of Lord Fullerton in the case of *The Commissioners of Inland Revenue* v. *Gordon's executors*, 12 Dec. of Court of Sess.; 2 Ser. p. 657, are somewhat in point. "If," said his lordship, "in order to constitute a domicil there were required an *animus remanendi* so permanent and so absolute as to be independent of all possible change of circumstances, I do not understand how, in the constant uncertainty and transition of all sublunary events, a domicil ever could be established. I think, on the contrary, that the domicil is entirely independent of the motive by which the party was influenced in adoping it. If the motive was one which naturally led to a permanent residence, and if under the influence of that motive, the party did act, the *animus* is sufficiently established, and the presumption cannot be taken off by the mere possibility, or even the probability, that but for the existence of the inducement the party might have established himself elsewhere." The same learned judge in the case of *Arnott* v. *Groom*, 9 Dec. of Court of Sess. 2nd series, p. 142, (and therefore, of a previous date)

Domicil independent of motive.

made some very pertinent remarks upon the cases of *Somerville* v. *Somerville*, and the case of Dr. Munroe (*Munroe* v. *Douglas*) where it was held that because he (Dr. Munroe) had not fixed on any other domicil, (although it was not pretended that he had not left India permanently,) India was his domicil at the time of his death. Cases might be conceived, he said, involving questions of domicil, in which this principle would lead to strange conclusions, but as limited to the law of intestate succession, it was, perhaps, not very unreasonable. A man having the power of disposing of his property as he chose, and the act of the law being, as it were, the substitute for any expression of his intention on the subject, the change of domicil truly operated as an alteration of his implied will, and there might be some reason for holding that nothing should be held so to operate short of a clear, and definite, and complete purpose to fix himself in some other country, where a different law on the subject was in force.

Change of domicil alteration of an implied will.

The above *dicta*, as far as they go, are in favour of the reverter of the domicil of origin; and upon the principles regulating this subject, certainly the case of *Munroe* v. *Douglas* went as far as it is possible to conceive the law could be carried. There was an absolute and entire abandonment of the residence in India, the only qualification upon that being that it was not absolutely completed by an acquirement of a new domicil, and the mere progress towards such an end was not thought sufficient to complete the abandonment. But, Lord Fullerton, as above, expressed grave doubts upon the soundness of the rule, and those doubts, are, I think, entitled to great weight; for there scarcely appears any reason where there is a total abandonment, not to hold that the domicil of origin would revive, and be the domicil where a party dies *in itinere*.

Doubts as to the soundness of *Munroe* v. *Douglas*.

CHAPTER VIII.

OF TWO EQUAL DOMICILS—TWO DOMICILS BARELY WITHIN POSSIBILITY — PREPONDERATING CIRCUMSTANCES — RESIDENCE OF THE WIFE—DOMICIL OF ORIGIN—SMALL FACTS WEIGH—OBSERVATIONS OF AN AMERICAN JUDGE.

ALTHOUGH it is generally easy to determine where a man has his domicil, so far as the possession of a house wherein he resides, is concerned, yet, as I have said in another place, it has happened more than once that an individual of wealthy means, and eccentric or wandering disposition, has possessed establishments in different countries of the globe at one and the same time. A case is barely within the limits of possibility where the circumstances are precisely similar in the case of two domicils; for as any one circumstance relating to either would be allowed to weigh either for or against it—this is not only an argument against a man having two domicils, but almost shows the impossibility of such a thing subsisting at all, independently of the view which the law might take of such a possibility. One of the most difficult cases coming under this head which has perhaps ever occurred was the case of *Forbes* v. *Forbes*, decided by Vice-Chancellor Wood, 1 Kay 341, and already adverted to, but even then, there were many circumstances which upon investigation greatly preponderated in favour of the English domicil, and that was decided to prevail at the time of the testator's death In that case the testator had a mansion and estate in Scotland where he constantly resided, but at the same time possessed the lease of a house in London, and kept an establishment of servants, and also resided there from time to time; but still there were so many circumstances operating both ways, namely, the

Two domicils scarcely possible.

domicil of origin being Scotch, the position which the testator held in Scotland, and the duties he fulfilled there, as to make it extremely doubtful whether the domicil was not Scotch, had it not been that his wife resided mainly in London, and his establishment in Scotland consisted of servants hired for the time only; and upon these two facts, but chiefly upon the first, the domicil was held to be English. In reference to this circumstance the case of *Warrender* v. *Warrender*, 2 Cl. & Fin. 536, was cited, in which the principle was recognised, that the wife's presence regulates the domicil, although rebutted by the circumstance of the parties being separated; but under ordinary circumstances, the place where the wife resides must certainly be looked upon as the "home" of the parties. In observing upon this principle, Vice-Chancellor Wood happily remarked that the wife must certainly be regarded as the tutelary genius of a man's house, and stand in the place of the *lares* of old; and it was considered on all the authorities as an almost decisive circumstance to determine the domicil, that it was the residence of the wife, she being, as it were, indivisible from the family and establishment. In cases of this kind, the slightest circumstance has weight, because, although slight in itself, yet, coupled with other facts, also, alone equally slight, it may have in that way considerable influence, even retrospectively, in determining which of two domicils shall prevail. In such a case it is very doubtful whether domicil of origin would not, *simpliciter*, as such, have a preponderance, although the question rests on evidence which must necessarily vary in every case. In the case of *Lord* v. *Colvin* before referred to, the most voluminous evidence was pretty equally balanced, and domicil of origin was held to prevail. Although it seems to be assumed that length of time, or diuturnity of residence, as it is called, is alone sufficient to determine a domicil, yet in the case of two equal domicils, it is doubtful whether that would be so, inasmuch as a man might regard both as equally in the light of a home, chance circumstances only causing the residence

Residence of the wife.

Slight circumstances of weight in determining between two domicils.

Diuturnity of residence.

CHAP. VIII.

in duration in the one to outweigh that in the other, and therefore, it appears to be necessary that more than one circumstance must be adduced to give a preference, although any circumstance going to show that the party considered one of the two his home, would of course guide the decision as to that one being the domicil. Upon the whole, we may conclude that in the case of two or more equal domicils, that is, both being residences, the fact of the wife residing, a fixed establishment of servants, spending the greater part of the year there, say the winter months, and using the other as a summer resort for change or recreation only, would be sufficient to determine in favour of one over the other, it not being possible to lay down any positive rule, except such as may be applied upon general principles. And where the circumstances are so balanced as to make it impossible to decide which was the preponderance, then the domicil of origin turns the scale.

In doubtful cases domicil of origin prevails.

In another place I have referred to the case of *The Inhabitants of Abington* v. *The Inhabitants of Bridgwater*, 23 Pickering's American Reports, 170; and as to another point, but in the same case are some striking *dicta* relating to the question of two domicils to this effect. Two considerations must be kept steadily in view, first, that every person must have a domicil somewhere, and secondly, that a man can have only one domicil for one purpose, at one and the same time. Every one has a domicil of origin which he retains until he acquires another, and the one thus acquired is in like manner retained; and the supposition that a man can have two domicils would lead to the absurdest consequences. If he had two domicils within the limits of distant sovereign states in case of war, that which would be an act of imperative duty in one would make him a traitor to the other, as not only sovereigns, but all their subjects, collectively and individually, are put into a state of hostility by war. He would become an enemy to himself, and bound to commit hostilities, and afford protection to the same persons and property at the same time. But, suppose he was domiciled within two military districts of

Absurd consequences of two co-existent domicils

Anomalous effects of two co-existent domicils.

the same state, he would be bound to do personal service at two places at the same time, and in two countries, and he would be compellable on peril of attachment to serve on juries in two remote shire towns, or in two towns to do watch and ward in two different places; or suppose he was removed by a warrant to the place of his settlement or residence, it would follow that two sets of civil officers would be bound to remove him by force, each acting under a legal warrant; these are, therefore, rather *postulata* than propositions to be proved, yet they go far in furnishing a test by which the question may be tried in each particular case. It depends not upon proving particular facts, but whether all the facts and circumstances taken together tend to show that a man has his home or domicil in one place, and overbalance all the like proofs tending to establish it in another. Such an inquiry, therefore, enables a comparison of proofs, and in making that comparison there are some facts which the law deems decisive, unless controlled and corrected by others still more stringent. It will be seen by these observations what the view taken by the American judges is of the possibility of two subsisting domicils; and it seems to me that they are of considerable value.

CHAPTER IX.

THE EFFECT WHICH DOMICIL HAS IN RESPECT OF FOREIGN CONTRACTS—QUESTIONS OF CONTINENTAL LAW—RECOGNITION OF FOREIGN CONTRACTS INTERNATIONALLY—MARRIAGE CEREMONY IN THE ENGLISH FORM, AND CONTRACT IN THE FRENCH FORM, BY PARTIES DOMICILED IN ENGLAND—CONTRACT ACCORDING TO FRENCH LAW—EFFECT OF DOMICIL ON FOREIGN CONTRACTS—ENGLISH ARTICLES UPON A FRENCH MARRIAGE—ANOMALY OF ADJUDICATING UPON A FOREIGN MARRIAGE—UNSATISFACTORY STATE OF THE FRENCH LAW—MARRIAGE WITH A FOREIGNER—DOMICIL OF WIFE NOT MERGED FOR SOME PURPOSES—MARRIAGE IN ENGLAND IN THE SCOTCH FORM—LEGITIMACY—LEGAL STATUS OF AN ENGLISHMAN IN FRANCE—ENGLISH BOND—SCOTCH HERITABLE BOND—JUS NOBILIUS—PRIORITY OF CREDITORS REGULATED BY THE DOMICIL—MARRIAGES BY BRITISH SUBJECTS NOT VALID BY ENGLISH LAW, CELEBRATED ABROAD WHERE SUCH MARRIAGES ARE VALID—NOT EXTENDING TO SCOTLAND—MARRIAGE WITH DECEASED WIFE'S SISTER—SCOTCH JURISDICTION—DOMICIL APPLICABLE TO PERSONALTY—EFFECT OF FOREIGN DOMICIL UPON NATIONAL RIGHTS—ADMINISTRATION—INTESTACY.

CHAP IX.

INASMUCH as the law of domicil operates upon foreigners as well as natural born subjects of a state, it becomes a matter of some importance to consider what effect the acts of a party domiciled in another country would have in this country, or upon the continent. This question would generally have its origin in acts of a mixed character, that is, where part of such acts came within the foreign law, and part within the law of the place of domicil. Suppose a person domiciled

Acts of a mixed character.

CHAP.

in England (for it is with reference to the view *our* law takes that this question is discussed) goes abroad, but without losing the English domicil, and does acts, partly according to the law of the country where he or she then is, and partly according to our law; if the acts done according to the foreign law are connected with and depend upon the acts done according to the English law, a court of equity in this country will hold the foreign acts binding according to the law of that country; and personal property belonging to a party domiciled in England will be administered by English courts of equity, although dealt with by instruments invalid according to the foreign law of the country in which the instrument is made; that is, the law of this country will both take cognizance of and act upon contracts entered into in a foreign form by a party domiciled in England, and carry out all other acts not recognized by the law of a foreign country, but in the English form. This question was argued in the case of *Este* v. *Smyth*, 18 Jur. 300; 2 W. R. 148, before the present Master of the Rolls. In that case a marriage took place in Paris according to the English form; both parties being domiciled in England, and a contract was entered into to settle property, partly charged on real estates in England, and in the French form and language. Each party contributed to the amount settled, which was to be held in common according to the custom of Paris, which the parties agreed should prevail with respect to it, wherever they should happen to reside. It was also agreed that the surplus of what should belong to each of them, together with whatever should come to them, whether moveable or immoveable during the coverture, should belong to the said intended husband and wife respectively *biens personnels*, *i.e.*, to their separate use. Between the date of the contract and the time of the marriage the *Code Napoleon* was promulgated, and it was admitted that it came within the terms of that code The parties very shortly separated, and the wife made a will in the English form, expressed to be "in pursuance of all powers enabling her in that behalf" giving legacies, and the residue to the plaintiff,

Acts acc ing to fo law by a glish sub

Marriage France.

French settleme

Code Na leon pas subseque

Separati

CHAP. IX.

English will made abroad.

and died, and the will was proved in Canterbury (*vide Este* v. *Este*, 3 Robertson 351;) some of the property settled was raisable by trustees, but in consequence of the opposition of the husband they refused to raise it, and this bill was filed in consequence; and the questions were, first, whether, there being no valid marriage by the law of France, the contract made in contemplation of a French marriage was or was not subsisting; and whether the husband was entitled to the wife's personal property under his marital right? Or, in the alternative, whether, supposing the contract valid, it gave the wife power to dispose of her property in the English form? The opinions of eminent French *avocats* were taken on these questions. The *Master of the Rolls* thought that the parties were competent, in anticipation of an English marriage, to contract that their rights should be regulated by the laws of any country they chose; but that the effect of the contract upon French property was not within the jurisdiction of the court to decide. He then considered the effect of the contract with reference to the English property, and construed it according to the French law, and declared the will valid inasmuch as it had been proved in England, and therefore declared valid by a competent court. The summary of this part of the subject is, that a domicil puts the party in possession of exactly the same rights as a natural born subject would have, and the domicil is a sufficient substratum to enable the enforcement of contracts, not only in the form and according to the law of the country where the domicil exists, but of any other country where the domiciled party may be temporarily residing. The case of *De Verne* v. *Routledge*, Sirey's (French) Reports, 1852, is in point on this question upon this part of the subject, and will be found extracted in the case of *Bremer* v. *Bremer*, 1 Deane. Eccles. Rep. 200. The 13th article of the Code Napoleon is as follows:—"L'etranger qui aura été admis pour le Gouvernement à établir son domicile en France y jouira de tous les droits civils tout qu'il continuera d'y resider." That is, a stranger receiving

French contract not within English jurisdiction as to French property, *contra* as to English.

Domicil regulates foreign contracts.

Code Napoleon.

Author tion in as to ci rights.

the authorization of the Government, and establishing a domicil in France, can enjoy all civil rights, including of course the power of executing legal documents. Demolombe's *Cours de Code Civil*, p. 143-4; *Code Napoleon*, 319. In the case of *Watts* v. *Shrimpton*, 21 Beav. 97, an Englishwoman had married a domiciled Frenchman, and articles were executed in the English form previously to the marriage, under which the wife was entitled to £200 *per annum*. The husband afterwards separated from her, and the French court condemned her for adultery, and it was held that the contract of marriage was English, and the rights of the parties were to be regulated by the English law, and further that the property of the wife having fallen into possession, and the moral conduct of both parties being reprehensible, the income of the fund must be equally divided between them. It must be confessed that this case is somewhat singular in its principle; for it recognizes the contract, marriage, &c., as English, and yet adjudicates upon the breach of it according to the French law, and further than that proceeds as to the decision of the case, both on the assumption of the marriage as valid according to the English law, and the offence of the wife according to the French; and then sums up all by taking into consideration the conduct of both parties, from which the conclusion is unavoidable that where a native of England marries a person domiciled in France, and the marriage and its concomitants are according to the English law, not only will the French law recognize the English marriage as binding, and punish for an offence in breach of its obligations, but the English courts will adjudicate upon the footing of the judgment of the French courts as to the adultery; and also take into consideration extraneous circumstances. It is not difficult, however, to see upon what reasoning the French law proceeds, namely, that for the purpose of merely trying the question of adultery, the fact is distinct from the marriage, although it recognizes a foreign contract as binding upon a domiciled subject of France, by implication, inasmuch as it condemns the other party for infidelity, which it could not do without assuming

Marria France Englis tlemen subseq adulte

Appar anoma the Fr law.

Fact o marri assum

CHAP. IX.

Unsatisfactory state of the French law.

the marriage as valid. The *Code Civile* is a perfect model of simplicity and perspicuity, and yet cases and authorities have so multiplied that I believe the French law is now admitted to be in a most unsatisfactory condition, and this is somewhat embarrassing, because, for some purposes it is impossible to avoid recognizing foreign contracts made with a British subject; for, of course, to do otherwise would be seriously to affect moral relations, where innocent parties are concerned, which no system of laws, founded on equitable principles, would for a moment sanction. I think, there can be no doubt that a marriage solemnised according to the law of the native country of one of the parties is binding upon both, and that would extend to all contracts made between them in good faith, and without anything to render them inequitable, and the authorities show that the domicil of a party, though merged in that of the other party by a foreign contract, yet will so far be recognised as to uphold a contract made according to the laws of the country of which the party so losing the domicil is a native, except so far as the laws of that country considered the party under disability by reason of coverture, conviction, infancy, or incapacity. In the case of *Strathmore* v. *Bowes*, 4 Wils. & Shaw, App. 89, it was not questioned that where a man's domicil was Scotch, if he did acts in England which would amount to a legal marriage, if he were then in Scotland, and his domicil was Scotch at his death, the marriage was legal. In that case the question was whether a child was legitimate so as to inherit a title, which I take as distinct from the general question of legitimacy for any other purpose, because it was distinctly held in exactly the same circumstances that a child would be legitimate, *Robins* v. *Purton*, 6 W. R. 457.

Contract good according to laws of native country of wife, though losing her domicil in that of her husband.

Scotch marriage.

Legitimacy.

Upon the general state of law as existing between us and our continental neighbours, it may not be superfluous to quote some observations which appeared in a French journal of September 1857, with reference to the "legal status of an Englishman in France." With reference to a case—that of *Perkinson* v. *Bedoe*—which has lately

come before the civil tribunal at Paris, the plaintiff's solicitor, Mr. Margary, addresses to *Galignani's Messenger* the following general statement of the existing law.—

"Great facilities are given by the law of France for the arrest of a foreigner when the creditor is a Frenchman, and many an unfortunate Englishman has been incarcerated upon overdue bills of exchange (often obtained from him fraudulently) endorsed to a Frenchman. As, however, in the majority of cases the party is not a *bonâ de* holder for valuable consideration, but merely a man of straw who lends his name for the occasion (technically called a *prête nom*), the debtor generally succeeds in obtaining his liberation on showing to the court the real nature of the transaction, and getting the arrest declared illegal. This, however, requires some time to effect, as, if he succeeds in the *Tribunal de Commerce*, the nominal creditor appeals to the *Cour Impériale*, and months elapse before a final judgment can be obtained. In the meantime the unfortunate debtor must remain in prison, unless he can deposit the amount claimed in the *Ciasse des Consignations*, or give bail; and, as the surety is not only answerable, as in England, for the appearance of the debtor, but also for the payment of the debt and costs in case judgment is given against him and he is unable to meet the demand, it is almost impossible for a foreigner to find a substantial person willing to undertake responsibility. In England no distinction is made as to liability to arrest between a British subject and a foreigner, as neither can be arrested on mesne process (that is, before judgment), unless the creditor can prove, to the satisfaction of a judge, that the debtor intends to leave the country. Art. 11, tit. 1, liv. 1, of the Code Napoleon says:—'L'étranger jouira en France des mêmes droits civils que ceux qui sont ou seront accordés aux Francais par les traités de la nation à laquelle cet étranger appartiendra.' It is not, however, sufficient that certain rights are accorded to Frenchmen by the laws of a foreign country for the subjects of that country to enjoy the same privileges in France, the reciprocity must be expressly stipulated for by treaty (see

CHAP. IX.

Rogron's note on this article in his *Code Civil Expliqué*). Now, no treaty exists which puts Frenchmen in England, and Englishmen in France, upon an equality as to arrest for debt, the former enjoying in England the same privilege in that respect as a British subject purely and simply by the law of the land. It strikes me, however, that if the case were brought officially to the notice of the French Government they would admit the equity of the claim of British subjects to enjoy in France the same privileges as the law of England accords to Frenchmen in that country, and the cordial alliance which now exists between the two nations, the high sense of justice of the Emperor of the French, and the well-known zeal of our ambassador at Paris, seem to render the present moment peculiarly favourable for obtaining the desired object."

Statute of Limitations with respect to Scotland.

As Scotland may, for many legal purposes, be considered as a foreign country, it is as well to observe that it has been held that the statute of limitations runs against a party who had contracted a debt in England by simple contract, and come to Scotland where he remained domiciled. *Gibson* v. *Stewart*, Dec. of Court of Sess., vol. 9, p. 525. It has also been held that where money was lent on a bond in the English form, the transaction taking place between parties domiciled in England, and the obligor afterwards gave a heritable bond charging lands in Scotland, the English bond was a mere personal security, and did not merge in the *jus nobilius*. *Cust* v. *Goring*, 18 Beav. 383. *Lamb* v. *Lamb*, 5 W. R. 772. The priorities of creditors also are regulated by the domicil of the testator, though his personal estate may be situate and administered in another country. *Wilson* v. *Lord Dunsany*, 18 Beav. 293.

Heritable bond and *jus nobilius*.

Marriages invalid as to English law, but valid in a foreign country.

A most important, as well as interesting part of this subject is with regard to marriages celebrated in a foreign country, and more especially where both the ceremonial and the actual ability of contract are not valid according to our law. Now, in the former case, there can be little doubt, and indeed, I believe, it is admitted, that a marriage contracted according to the *lex loci* is good, supposing the

parties may legally contract such marriage, according to the provisions of our law—the only exception being where such foreign country is a colony appendant to Great Britain, in which case the law of Great Britain would apply not only to the marriage (as affecting the parties to it), but to the actual ceremony. But in the latter, it is now well settled that nothing can make a marriage between British subjects legal, which marriage is not legal according to our law; and although it may be a perfectly good marriage as long as they remain within the pale of those foreign states, (so far, that is, as any question may there arise,) by the laws of which it is declared to be lawful, it becomes bad, or rather the law attaches (for it always was bad by our law) the moment they come within our jurisdiction. As regards Scotland, the law on this subject, as indeed in many others, is, as regards that country, in a very anomalous state. The Act 5 & 6 Wm. 4, c. 54, which has been held to make the marriage with a deceased wife's sister void, does not extend to Scotland; and indeed, it was quite unnecessary that it should, inasmuch as such marriage, though the ceremony may take place unquestioned, is penally recognised when once contracted, and punished accordingly, very much in the same way as bigamy in England; the marriage, so far as the relative position of the parties goes in consanguinity, is good; but the man by reason of a previous act, the consequences of which are still subsist ing consequences, is disabled from contracting it, that is, he renders himself penally liable if he does so. So that a man domiciled in England may marry his deceased wife's sister in Scotland; but the moment he is indicted under the Scotch law, plead that it is no marriage. This subject, however, is fully discussed in a case of *Brook* v. *Brook*, of which I insert an extract from a report in the Weekly Reporter, vol. 6, p. 110. This case came before the Vice-Chancellor Stuart and Mr. Justice Cresswell, and was argued in March, November and December, 1857, and the following were the facts:—B. by his first wife C. who died in 1841, had one son and one daughter. In 1851, he being then

Marriage in a British colony.

Attaching of the English jurisdiction.

5 & 6 Will. 4, c. 54, not applicable to Scotland, and why.

Brook v. *Brook*.

Chap. IX.

a domiciled English subject, intermarried in Denmark with E. the sister of his deceased wife (such marriage being valid according to the *lex loci contractûs*) by whom he had one son and two daughters. By his will, dated in 1855, he gave all his real and personal estate among the children of both marriages in certain proportions. The testator B. and his second wife E. died in 1855, and the son of their marriage in 1857. The question then arose, whether the share of this son in B.'s estate went, as to the realty to B.'s son by the first marriage, and as to the personalty to all B.'s children equally, or whether such share, both as to realty and personalty, passed to the Crown by reason of the invalidity of B.'s second marriage in this country, and consequent illegitimacy of the issue.

Cases on foreign contracts.

Upon the effect of a foreign contract the following authorities were referred to:—*Butler* v. *Freeman*, 1 Amb. 301; *Compton* v. *Bearcroft*, cited 2 Hagg. Cons. Rep. 443; and "Buller's Nisi Prius," 6th ed. 113; *Fenton* v. *Livingston*, 18 Fraser; and "Story's Confl. of Laws," ss. 66a, 97, 98, 112, 123, & 123a. The writer last mentioned showed that such marriages as the present, if valid in the country where celebrated, must be equally so in all other countries by the comity of nations. Sir F. Kelly also cited *Ruding* v. *Smith*, 2 Hagg. Cons. Rep. 371; *Thompson* v. *The Advocate-General*, 13 Sim. 153; s. c. 12 Cl. & F. 1: *Roach* v. *Garvan*, 1 Ves. sen. 157; *Middleton* v. *Janverin*, 2 Hagg. Cons. Rep. 437; and "Story's Confl. of Laws," s. 124.

26 Geo. 2, c. 33, as to clandestine marriages.

On the other hand, the 26 Geo. 2, c. 33, for the better prevention of clandestine marriages, was for a century evaded, by parties intending to marry going to Scotland or abroad. Two years after the passing of that Act Lord Hardwicke held, although the words of that enactment were stronger than those of 5 & 6 Wm. 4, c. 54, that it did not affect the marriage of British subjects in foreign countries. This distinction was very strongly remarked upon by Lord Brougham, in 11 Cl. & Fin. 150-1. The following authorities were also referred to:—"Story's Conflict of Laws," 115; *Medway* v. *Needham*, 16 Massachusetts Reports, 157;

Dalrymple v. *Dalrymple*, 2 Hagg. Cons. Rep. 58; *Herbert* v. *Herbert*, ib. 263; 3 Phill. Eccl. Rep. 58; *Scrimshire* v. *Scrimshire*, 2 Hagg. Cons. Rep. 395; *Lacon* v. *Higgins*, 3 Stark. 178. "Story's Confl. of Laws," s. 121; 25 Hen. 8, c. 22; 4 Wm. 3, c. 3, and 2 Anne, c. 6. *Huber Prelectiones Juris Romani et Hodiurni, in "De Conflictu Legum,"* p. 2, b. 1, tit. 3, ss. 3, 8, et seq. ed. 1689. *Jefferys* v *Boosey*, 4 Ho. Lds. Ca. 815; *The Attorney-General* v. *Forbes*, 2 Cl. & Fin. 48; *Thompson* v. *Advocate-General*, 12 Cl. & Fin. 1; *Arnold* v. *Arnold*, 2 Myl. & Cr. 256, 270; and the dictum of Pollock, C. B., in *Jeffery* v. *Boosey*, *ubi suprà*, 939; and that of Lord Cottenham, C., in *Arnold* v. *Arnold*, 270; and to *Regina* v. *Chadwick*, 11 Q. B. 173. *Conway* v. *Beazley*, 3 Hagg. Eccl. Rep. 651; *Warrender* v. *Warrender*, 2 Cl. & Fin. 488, 530; *Rex* v. *Lolley*, Russ. & Ry. C. C. 237; *Greenwood* v. *Curtis*, 6 Massachusetts Rep. 378, 379; "Story's Confl. of Laws," s. 97 (opinion of Lord Meadowbank there cited), and ss. 100, 103, 104. "Story's Confl. of Laws," ss. 20, 262, 291; "Voet's Commentaries," b. 1, tit. 4, ss. 1, 2, et seq. *Sheddon* v. *Patrick*, 5 Paton's App. Cas. 194; s. c. 1 Macq. Ho. Lds. Ca. 535; *Birtwhistle* v. *Vardill*, 2 Cl. & Fin. 571; 7 Cl. & F. 918, 935; *Munro* v. *Munro*, ib. 842. "Burge's Commentaries on Colonial and Foreign Law," p. 1, ch. 5, s. 1147. Huber (lib. 1, tit. 3, "De Conflictu Legum," s. 2, 538) on the comity of nations as applicable to this subject has this passage:—"That the rulers of every empire from comity admit that the laws of every people in force within its own limits ought to have the same force everywhere so far as they do not prejudice the powers or rights of other governments or of their citizens." By the comity of nations, a foreign country is bound to take the rule of our own law on this subject as applicable to our own domiciled subjects. *Rose* v. *Rose*, 4 Wils. & Shaw. 289; *Harford* v. *Morris*, 2 Hagg. Cons. Rep. 423; *Scrimshire* v. *Scrimshire*, ib. 407. *McCarthy* v. *Decaix*, 2 Rus. & Myl. 614; *Sherwood* v. *Ray*, 1 P. C. C. 353, 396; *Forbes* v. *Cochrane*, 2 Bar. & Cress. 448, 470; *Ray* v. *Sherwood*, 1 Curt. Eccl. Rep. 173, 193. Saint

International rights.

Recognition of laws between foreign countries.

CHAP. IX.

Contracts made in a foreign country.

Joseph, 2 Concordance entre les Codes Civils Etrangers, 139. In *Male* v. *Roberts*, 3 Esp. 163, Lord Eldon held that the law of the country where the contract arose must govern the contract. In that case the cause of action accrued in Scotland, and infancy was pleaded, and it was decided that the defendant must show that infancy was a legal defence to the demand by proving the law of Scotland in that respect. So also, in *De la Vega* v. *Vianna*, 1 B. & Ad. 284, which was a suit between parties resident in England on a contract made between them in a foreign country, it was held that the contract must be interpreted according to the foreign law. Stuart, V.C., (Nov. 25), said that the case was by far too important to be dealt with except upon mature consideration, and reserved his decision. On the 4th December, Cresswell, J., delivered his opinion upon the case stating the facts, and observing upon the various authorities and arguments adduced: his lordship (*inter alia*) said that Sir George Hay, in pronouncing judgment in *Harford* v. *Morris*, 2 Hagg. Cons. Rep. 423, expressed an opinion that marriages of English subjects having an English domicil celebrated in other countries have been held valid—not merely because they would be valid according to the laws of those countries, but because they were not contrary to the law of England. In p. 434 he says, "I do not say that foreign laws cannot be received in this court in cases where the court of that country had a jurisdiction, or that this court would not determine upon those laws in such a case. But I deny the *lex loci* universally to be a foundation for the jurisdiction, so as to impose an obligation on the Court to determine by those foreign laws." The judgment in that case was reversed, but upon grounds wholly irrespective of the opinion above cited. It therefore remains of such value as the reputation of the learned judge by whom it was pronounced can give to it. And in *Warrender* v. *Warrender*, 2 Cl. & Fin. 488, 530, there are some passages in the judgment delivered by Lord Brougham which throw much light on this question. In one place he says, "The general principle is denied by no one that the *lex loci* is to be the governing rule in deciding upon the validity or invalidity

Marriage of English subjects celebrated abroad.

The *lex loci* not a universal foundation of jurisdiction.

of all personal contracts. But the rule extends, I apprehend, no further than to the ascertaining of the validity of the contract, and the meaning of the parties; that is, the existence of the contract, and its construction. The case of *Reg.* v. *Lolley* (*ubi suprà*), although not directly in point, almost compels one (if it be good law) to adopt that opinion. The case was this:—An Englishman married in England. He afterwards went to Scotland, and obtained a divorce there, which according to the law of that country dissolved the marriage. He then returned to England, and married another woman, leaving the first wife, for which he was indicted, tried, and convicted. The propriety of that conviction was argued by very able counsel before the twelve judges, and, by their unanimous opinion, was held to be correct." The learned judge then went on to say, "There are some passages in 'Huber's Prelectiones Juris Civilis' which show that, in his opinion, the *comitas gentium* did not require so large an effect to be given to foreign law. In his chapter 'De Conflictu Legum' he states, in s. 2, three axioms:—'1 Leges cujusque imperii vim habent intra terminos ejusdem reipublicæ, omnesque ei subjectos obligant, nec ultra. 2. Pro subjectis imperio habendi sunt omnes qui intra terminos ejusdem reperiuntur, sive in perpetuum sive ad tempus ibi commorentur. 3. Rectores imperiorum id comiter agunt ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim quatenus nihil potestati aut juri alterius imperantis ejusque civium prejudicetur.' There is nothing in the case of *Roach* v. *Garvan*, Ves. sen. 157, to show that if the parties had been British subjects domiciled in England, and it had been contrary to our law, and the courts of this country had been called upon to adjudicate with regard to it, they would have held it valid. The next case in order of time was *Scrimshire* v. *Scrimshire*, 2 Hagg. Cons. Rep. 395." In a subsequent part of the judgment he continued, "I have found nothing to justify giving the more extensive meaning of the words of Lord Stowell except some passages in Mr. Justice Story's work on the 'Conflict of Laws,' and a decision cited by him from the

Divorce in a foreign country of parties married in England.

United States *inter se* not analogous to different countries.

reports of the Court of Massachusetts; and perhaps this greater force given in one of the United States to the laws of another at variance with its own may be accounted for by the greater inclination that would naturally exist to give a larger scope to the *comitas gentium* between the different states of the Union than could be expected to find place amongst nations wholly independent of, and unconnected with, each other. I have therefore come to the conclusion that a marriage contracted by the subjects of a country in which they are domiciled in another country is not to be held valid if by contracting it the laws of their own country are violated." Vice-Chancellor Stuart subsequently delivered judgment, in which he concurred substantially with the opinion delivered by Mr. Justice Cresswell.

Scotland a foreign country, especially with regard to domicil.

The case of *Brook* v. *Brook*, (on appeal, 9 W. R. 461), shows that Scotland for many purposes is a foreign country, and, as I have often had occasion to observe, especially in the case of domicil. This is well illustrated by the case of *Maclaren* v. *Stainton*, 22 L. J., N. S., Ch. 274, & 26, ibid. 332. In that case Henry Stainton, who was domiciled in England, was the London agent of the Carron Iron Company, and was so at the time of his death, being then the holder of 101 shares in the company, worth £80,000. His personalty amounted to £182,000, and he was likewise possessed of large real estate in Scotland. His will was proved in England and Scotland, and the Carron Iron Company brought an action against his executors in the Court of Session for £100,000 alleged to be due on a balance of accounts, and the company obtained letters of arrestment against the real estate in Scotland. A bill was filed in England by the executors against the Carron Company to restrain that action, and the case coming on at the Rolls the Master of the Rolls granted the injunction, and afterwards dismissed a motion to dissolve it. On appeal to the House of Lords this decision was reversed. Another suit was then instituted by the executors, and an injunction similar to the other was moved for before the full Court of

Jurisdiction over property in Scotland belonging to a party domiciled in England.

Appeal, when the Lord Chancellor and Lords Justices refused the motion with costs. This decision at first sight would seem to trench upon the rule that property is regulated by the law of the country in which a party dies domiciled; but, upon looking into the matter, it will be seen that it does not do so. This was a question of jurisdiction merely, and involved the right of the courts of one country to interfere with the proceedings of the courts of another country as relating to property in that country, not mere personalty, or moveable, but realty, and therefore a part of the soil. Now, the rule that I adverted to, applies, I imagine, exclusively to personalty, otherwise this evil would follow, that the mere fact of the owner of perhaps half the real estate in one country, gaining a domicil in another, would take away all the powers of the law of the country where the realty was situated, over that property upon so slight a circumstance, and deprive the Government of their dues; this could never have been intended, and therefore, the decision in the case of *Maclaren* v. *Stainton* is perfectly in consonance with justice, although the judgment delivered by their lordships does not go fully into the principle.

Domicil as affecting native rights.

There seems to have been at different times a question made with respect to the effect of gaining a domicil abroad, as regards the rights attached to the character of a native of a particular country, and it must be confessed there is some difficulty in dealing with such a question, because we are confused with words, and it is therefore necessary to go to the root of the matter to apply the principles of the law to it. It is a great principle of the English legislation that no native of this country should be ever without the means of sustaining life; and hence we have what is very properly called "a poor law;" and the fact that it is surrounded with official difficulties, sufficient sometimes to render it abortive, does not alter the case. At the same time we are not anxious to increase such a burthen, and therefore, if a man has no settlement here, although even then he may be temporarily relieved under the "casual pauper enactment," he must seek relief where he is settled. Where a man has

CHAP. IX.

Settlement and domicil the same only for some purposes.

no domicil he can have no settlement, although the same rule may not hold good as a converse proposition; for although in old times settlement and domicil were certainly identical words, domicil is now such a very uncertain thing that it cannot for a moment compete with the fact of a settlement. A domicil, moreover, is chiefly established to avoid government duties, or to gain some advantage under the shadow of a foreign law; whereas settlement would be rather forced upon our government officers than sought to be established by them, as they would lose and not gain by its proof. A domicil may take an English subject entirely beyond the reach of liability to our law in matters of impost, and virtually so in matters of debt. Indeed, it would be only by the permission of a foreign government that any species of legislative power could be exercised over a British subject domiciled abroad, with no property in England. The process of naturalization is regulated by statute, and must therefore differ, as in fact it does, in different countries, and the civil rights thus conferred are very distinguishable from the liabilities to which the property of the naturalized person is subject by the fact of his being domiciled where he is naturalized; and, therefore, it follows that although a British subject naturalized abroad, or a Frenchman naturalized in England, may whilst they and all their property remain in that which to them is a foreign country, acquire certain civil rights there, yet, they do not *ipso facto* lose their nationality, but at any moment by returning regain them, if indeed, they have ever lost them. It therefore comes to this, that whilst a person is domiciled and resident abroad, so far as civil liabilities are concerned, our law cannot forcibly touch him; but there is nothing to prevent his return at any moment to England, when those liabilities to which every British born subject is liable would, I apprehend, attach, and if so, why should he not also be entitled to civil rights? not, of course, that that would be a *sequitur* in the case of a foreigner. The object of naturalization is to gain something; but like domicil it is only operative as between the object

Naturalization does not destroy nationality.

and the government by which the naturalization is granted; and does not, *primâ facie*, abrogate nationality. Thus it was laid down in the case of *Duncan* v. *Cannan*, 18 Beav. 128 (13 Beav. 366), that there is no foundation for the argument or notion that a Scotchman by birth cannot acquire a domicil without repudiating his nationality; but it was doubted whether a foreigner could acquire a civil domicil in France without the authorization of the French Government. It was also decided that a Scotchwoman domiciled in England might still give a receipt to the trustees of a settlement made upon her in the Scotch form. The fact is, that domicil affects the property rather than the person; and although a native of one country may by the proper legal forms acquire certain rights in another, those rights are not affected by the domicil, and a person may either lose or acquire a domicil without such loss in the least affecting the rights he or she may have acquired by naturalization, or in any legal manner. With respect to the recognition of acts done in a foreign country, either by a party in his own right, or in right of another, the following appears to be the law. If a party applies for letters of administration in this country, to an intestate domiciled abroad, having already obtained a grant in the proper court of the country where the intestate was domiciled, it would seem that the ecclesiastical court in this country, generally speaking, will follow such grant. "*Williams' Executors*," 1—376. *In re Goods of Morgan*, 2 Roberts 415. But if the original administration be applied for in this country, in such case, where the deceased was a British subject or an alien, since in either event the distribution of his personal property is to be regulated according to the laws of the country of which he was a domiciled inhabitant at the time of his death, it appears to be a necessary consequence that the grant should be made to the person entitled to the effects of the deceased according to the law of that country; *ibid.* A foreigner dying in this country *in itinere*, the law of this country will not recognise the right of a foreign consul to take possession of his goods, 2 Curt. 274; *Atkins* v. *Smith*, 2 Atk. 63;

A domicil may be acquired without a repudiation of nationality or interference with right to obtain by naturalization.

Administration to a party domiciled abroad.

A foreigner dying in England *in itinere*.

CHAP. IX.

Barnes v. *Cole*, Ambl. 416; *Doe* v. *Vardill*, 5 B. & C. 451, s. c. 2 Cl. & Fin. 571, 7 ibid. 895, sub nom. *Birtwhistle* v. *Vardill*.

Where a party entitled to administration is resident abroad, he must have notice before administration can be granted to another person. *Goddard* v. *Creponier*, 3 Phill. 637. So in the West Indies, *Miller* v. *Washington*, 3 Hagg. 277; "*Williams' Ex.*" 1—385. If a foreigner dies intestate in the British dominions, administration will be granted according to the law of his own country. *In re Goods of Biggin*, 1 Add. 340; *In re Goods of Countess de Cunha*, 1 Hagg. 239; *In re Goods of Stewart*, 1 Curt. 904; *In re Goods of Rogerson*, 2 Curt. 656. In Scotland the same rule applies. The ambassador must certify the law of the country of which such foreigner is a native. *In re Goods of Dormoy*, 3 Hagg. 767.

Certificate of ambassador.

Assets in this country and abroad.

If an intestate is domiciled abroad, or within the sovereign's dominions out of this country, and has left assets here, administration must be taken out here as well as in the country of the domicil. *Le Breton* v. *Le Quesne*, 2 Cas. temp. Lee, 261; *Attorney General* v. *Bonwens*, 4 M. W 193.

CHAPTER X.

RESIDENCE IN VARIOUS COUNTRIES—IMPORTANCE OF PROPERTY LEFT IN A NATIVE COUNTRY—NEW DOMICIL NOT ACQUIRED BY INTENTION—IMPOSSIBILITY OF HAVING NO DOMICIL—POSSESSION OF PROPERTY A FACT—CIRCUMSTANCES RAISING PRESUMPTIONS—EFFECT OF COMPASSING A SPECIAL PURPOSE BY GOING ABROAD—TWO DOMICILS—QUESTION OF DOMICIL DEPENDENT UPON THE LEGAL DEALING WITH PROPERTY—EVIDENCE—APPLICATION OF GENERAL PRINCIPLES—ANIMUS AND FACTUM NECESSARY—EXAMINATION OF CASES—BIRTH AND DEATH IN A COUNTRY NOT SUFFICIENT—DOMICIL OF DEATH PREPONDERATES, THOUGH NOT IPSO FACTO LEGALLY RECOGNISED—BIRTH AT SEA—SERVANT OF GOVERNMENT—SOLDIER OR SAILOR—HALFPAY—ENTIRE REMOVAL AND PURCHASE OF AN ESTATE, BUT NON-RESIDENCE—RULE OF THE CIVIL LAW—SUCCESSION TO PERSONALTY REGULATED BY THE DOMICIL—DOMICIL OF ORIGIN PREVAILING—PROBABILES CONJECTURÆ—TRAVELLING FROM ILL HEALTH—DIFFERENCE OF OPINION OF JUDGES—FOREIGN MARRIAGE ALLEGED—AUTHORIZATION IN FRANCE—VALIDITY OF AN INSTRUMENT DEPENDS ON THE DOMICIL—JUS GENTIUM.

WE have seen the view which our law takes of the abandonment of either a domicil of origin, or an acquired domicil, in the simple and ordinary case of leaving a native country, settling abroad, so as to become a subject of a foreign state, and then returning to the domicil of birth, and there dying; but the case which involves the greatest difficulty is that in which the party has resided in an indefinite number of places, had establishments, perhaps in all,

CHAP. X.

Difficulty of applying known principles to the cases of desultory movements.

and even kept up several at the same time. Such a case is almost sufficiently difficult to baffle our endeavours to apply the well-known principles; and it is only by supposing a number of circumstances applicable to such cases, and considering the cases which have occurred, and upon which decisions have been come to, that we can arrive at anything like a conclusion. Every man must be possessed of some kind of property, and therefore, in such cases as that now under consideration, it is of importance to turn the attention to this point. Suppose a man having spent the greater part of his life in business, retires from his labours upon a competence, gives up housekeeping, disposes of his effects, and goes abroad, intending to devote the remainder of his life to change of scene, and the exploring of other countries, and to this end travels from place to place, regulating his sojourn in each according to his caprice, or the inducements he there finds to shorten or prolong it, and ultimately dies in one of these excursions; in such a case there can be no doubt that the domicil of origin has not been displaced, and the least article of property left behind him in his native country would be sufficient, I apprehend, to fix such as his domicil, in the absence, of course, of any fixed intention appearing to reside elsewhere. Thus, if furniture or goods be left in the country which is the domicil of birth or origin, and the owner of them travels from place to place abroad; but being charmed with some particular locality, determines there to locate himself, sends for such furniture and goods; takes a residence and there establishes himself for even two years or one year, though he should afterwards travel into other countries, even into his own, yet if he leaves his establishment and furniture in such foreign country, or until he actually abandons such residence by total sale of his property, and the giving up of his house, such residence will determine his domicil, and the domicil of birth or origin having been abandoned, and a new one acquired, the acquired domicil becomes the domicil until it is abandoned; and in the

Domicil of origin prevailing.

[redacted]ence of any such settling, the domicil of origin must, I [redacted]hend, be again had recourse to. Cases have occurred

in which a party has abandoned his original domicil, has acquired another, has abandoned that, has acquired another, and has then travelled about the world, having entirely broken up his establishment in the last place where the domicil was acquired, except that a few personal effects were left in such place in the care of a friend, there being still property existing in the second and acquired domicil; and yet as it clearly appeared that the last domicil was left merely for the sake of health; it was decided almost in the absence of all other evidence that the last acquired domicil was that to be considered as prevailing at the period of his death.

A new domicil not acquired by mere intention.

One great principle that is always acted upon in the cases of numerous and uncertain residence in different countries, is that a new domicil cannot be acquired by mere intention, however clearly evident; and therefore, if every species of property possessed by a person is converted into *specie*, and forms a part of his baggage, or even if such property, so converted, should be transmitted through a banker, or otherwise to another country, where the intention was to finally settle, unless the party does so settle, and remain long enough to be regarded as an inhabitant, with intention to remain, no new domicil is acquired; and if so, it follows, that the abandonment is only such in case of such new acquirement, and ceases to be an abandonment in case the new acquirement does not take effect. To decide otherwise would be in effect to say, that a man may have *no* domicil, a state of things quite inconsistent with the policy of the law. Circumstances as well as facts must be regarded in the consideration of this branch of the subject. What I mean is this:—The possession of property is a fact; but there may be ties both of interest and regard which so link a person to a particular country as to make it in the last degree improbable that he will ever abandon it. Thus, if an individual proceeds abroad upon a speculation, and hires a residence for a limited term renewed from time to time, but his position is such that he may return at any moment to his native soil, though the residence abroad is amply

Impossibility of no domicil.

Facts and circumstances.

CHAP. X.

Probability of return prevents acquirement.

sufficient to secure him in a new domicil, yet, it appears clear that a constant probability of return, more particularly if it be added to circumstances making it a matter of certainty that he will do so, although the exact period is uncertain, will have the effect of retaining the original domicil and preventing the acquirement of a new one.

No reverter by residence for the purpose of gain only in a foreign country.

It has been made a matter of argument, though never thrown out even as a *dictum* by a judge, but indeed an opinion expressed to the contrary, that a sojourn in a foreign country for the sole purpose of amassing property, when such a result occurs, will cause a reverter of the domicil of origin without the *factum* of arrival at, and residence in, that original domicil, the abandonment of the acquired domicil, and the dying *in itinere*, being sufficient to revest the old domicil, if I may use the expression; but this is so manifestly open to objection that it cannot be supported. Were it the law, the effect would be that every departure from one place with an intention to proceed to another would *ipso facto* cause a new domicil to be acquired in that other place, in which case the true ingredient would be wanting, namely, the party being so far a subject of that country that his property can be dealt with by the laws of that country, into which he has not even set his foot. Upon this point the question naturally arises, whether a man can have more than one domicil? But that I have before considered and is easily answered; for the very fact of its being necessary that he should either abandon one domicil before he can acquire another, or acquire another before he can abandon the first, shows that the law considers him as incapable of having more than one. (See *Somerville* v. *Somerville*, 5 Ves. 791.) If the domicil is in a foreign country, our law, of course, cannot deal with it *quoad* property, except according to the law of such country, and, therefore, it is upon the question, whether it can deal with it or no that the fact of the domicil mainly turns.

The question of domicil arises *quoad* property.

A case may be supposed where a domicil of origin is totally abandoned, and sojourns made in a variety of places during the whole remainder of the party's life,

and in such a case the point would rest between the domicil of birth or origin, and the circumstances attending the other different residences, and whether in the course of such wanderings any preference was shown to any particular place, such a residence being retained there, etc., and it would be difficult to say in such a case which would preponderate, although the domicil of birth would certainly be entitled to every possible degree of weight, and could not be displaced, except, first, by a sufficient residence in the other supposed locality sufficient to fix a domicil, and an express intention to return to it, although at an unknown and unfixed time. Possession of property, more particularly if it consists of houses or furniture, is always sufficient to preponderate, the true test, indeed, being, that wherever there is a manifest intention permanently to reside, there is the domicil. In the case of discursive movements from place to place, evidence is a most important portion of it, and the habits, turn of mind, and the intention of the person must be the guides in weighing such evidence; for where all is involved in such a degree of uncertainty, the slightest circumstance will be of consequence.

Possession of property a preponderating circumstance.

Habits, turn of mind, &c.

From all this it follows, that there is scarcely a case, be it ever so complicated, that cannot receive some kind of determination by the application of the general principles laid down upon this subject; and it must always be borne in mind that except in the case of domicil of birth or origin, where residence would be insufficient, the *animus* and the *factum* must be proved, that is the residence and intention to remain, without which no domicil can exist. Having said thus much as the result of the cases, let us examine the cases themselves. The case of Sir Charles Douglas (see *Ommany* v. *Bingham*, cited in a note to *Munroe* v. *Douglas*, 5 Madd. 379) is very strongly illustrative of this subject. In 1741, Sir Charles Douglas left Scotland (his native country), when only twelve years old, and entered the navy. When he attained the rank of captain, and not until then, did he return to Scotland, but left it again, married in Holland, where he had an

No domicil without *animus* and *factum*.

CHAP. X.

establishment, and again came to Scotland for the purpose of introducing his wife to his friends and connections, and remained there about twelve months. He commanded in the Russian navy, and was then in the Dutch service, and when he visited Scotland it was only temporarily, meantime having a residence at Gosport, where his wife and family lived; and lastly, being appointed to the Halifax station, he came to Scotland and died there. During all this time he never had a house of his own in Scotland, having made his will describing himself as of Gosport; and yet, upon the case being tried in Scotland, the Court of Session determined the domicil to be Scotch, merely upon the circumstances of the domicil of origin being Scotch, and his having died there; although he had expressed himself to a near relative as never meaning to settle there. There was no doubt that this decision was quite contrary to the present state of the law, whatever it might then have been, and accordingly we find that the case was appealed to the House of Lords, when their lordships reversed the decision of the Court below, and held that the domicil was English and not Scotch, upon the very obvious and rational ground that his home, where he had settled with his wife and family, and where he really lived whilst on shore, was at Gosport. Moreover, he had actually lived in other countries, and therefore, having acquired the rights and liabilities of a subject there, unless he had actually acquired a domicil in England, any one of those might have been preferred to Scotland, his domicil of origin having been abandoned, unless he had totally lost all those, the distinction between abandoning and losing being very great; for although abandonment may result in loss, yet mere abandonment is not synonymous with loss, unless it is followed up by subsequent acquirement of domicil elsewhere. *Lord* v. *Colvin*, 7 Weekly Reporter, 250; *In Re James Muir deceased*, ibid. 361.

Circumstances prevailing over domicil of origin.

Great distinction between abandonment and loss.

With reference to the subject of residence in various countries, the case of *Bempde* v. *Johnstone*, 3 Ves. 198, is important, the decision there was on the ground that

Domicil of birth and death prevails over *lex loci*.

there had been no acquirement of a fresh domicil, although, the habits of the party were very discursive; and the Lord Chancellor considered it as settled, that where there were two equal domicils, (supposing that possible,) the domicil of birth or death must preponderate, and not the *lex loci rei sitæ*; and it was made a question by the Master of the Rolls in *Somerville* v. *Somerville*, 5 Ves. 760-1, which would prevail, and he seemed to think that the domicil of death would prevail, as you minht suppose a case in which a person came from no one knew whither, but died in a particular country, so that, at all events, that was certain. Now, no doubt, that rule would be a very convenient one, and might be adopted in case it could not be ascertained where the *forum originis* was; but I think the bearing of the law at present would be in favour of the domicil of origin, because the law absolutely recognizes the one, and does not *ipso facto* recognize the other, that is, it is silent on the subject. Whereas a man must have a domicil of origin, that is, he must have a domicil, whatever country he is born in, by birth merely, although not perhaps by reference to his parents; for, as was observed in the argument in the case last referred to (*vide* 5 Ves. p. 761), even if a man is born on board of a ship, he has a *forum originis* by reference to the country to which the ship belongs, for it either takes him to that country, or it has not taken him to any other. In *Bruce* v. *Bruce* (elsewhere referred to), intention was held not to prevail, but actual residence; and there, the party being by origin a Scotchman, gained a domicil in England and in India, or rather, had he ever abandoned one, would certainly by his acts have acquired another. The Court of Session there decided on the *lex loci rei sitæ*, but Lord Thurlow took the ground of domicil, and decided on that, though, as it was said, unwillingly. Where a person resides in different countries as a servant of Government, discharging duties of a temporary character, it has been thought to be the law of Europe that such employment does not change the domicil; whereas, if the duty is permanent, it has that effect; and this latter rule would probably apply to the case

Domicil of death prevails in one case only.

Birth on board ship.

Government employment.

CHAP. X.

of any office where the retention depends upon the conduct of the person holding it, and is exercised in a fixed locality, or at all events, within the limits of the same country; whereas, it seems clear that an office or calling which compels residence in various countries, such as that of a soldier or a sailor on duty, does not either prevent a domicil being acquired in the ordinary way, or necessarily take away a domicil of origin, not being included strictly in the cases of necessary domicils. To illustrate this, it continually happens that a man holding a military or more usually naval commission forms a matrimonial connection in England, takes a house and sets up an establishment, and resides there, whenever he can obtain leave of absence, his wife constantly residing there, and yet, although he may himself actually reside for a lengthened period at a time in many different countries in succession, there can be no doubt that his domicil is English; and this, being so common a case, that most persons must have known many instances of it, is a fair test. (Denisart, Dictionaire, 2; letter D. p. 165.) In the case of half-pay, where leave of absence is constantly applied for, and obtained through a long course of years, the original domicil would remain, open, of course, to some circumstance, showing a decided probability that were the question tried the party would abandon the *forum originis*, and throw up the half-pay. The case of *Attorney-General* v. *Dunn*, 6 M. & W. 511, was a singular one. The original domicil was English; but the whole of the property being removed from this country, a foreign marquisate was purchased along with a chateau, which was put into a state of repair, the house being furnished, the grounds laid out, and an establishment of servants placed in it; but the improvements not being complete, the party had never actually resided there, but had lived in lodgings in various towns in the vicinity, or in some instances at some distance, although returning to it from time to time to inspect the progress of the works, and dying before the repairs and embellishments were completed. Under these circumstances, it was held that the domicil remained English, because the ingredient of residence in a permanent abode was

Desultory employment does not affect the general law.

Half-pay and leave of absence.

Purchase of a title and estate abroad.

Possession of property unnecessary.

wanting to complete the acquirement of a domicil. This was a very strong case, for it established the principle that it is not necessary to possess any property whatever in the country in which the domicil is retained. I have gone so fully into this part of my subject that I shall only refer to one or two more cases, because they embrace almost every principle upon which a decision can be come to. The first case I shall mention is that of *Somerville* v. *Somerville*, 5 Ves. 750, which was most elaborately argued, and is most fully reported, and considering that this kind of law was then comparatively in its infancy, I suppose no case could be found where so much is embraced in one view. The question related to the personal estate of the late Lord Somerville, the great mass of it being in England, and the family estate in Scotland, Lord Somerville having been extremely uncertain and various in his movements. He was born in Scotland, in June 1727, either at the family mansion, or a house occupied during the time it was repairing, but which was uncertain; he was at school at Dalkeith and Edinburgh, and afterwards in Gloucestershire. He was then sent to Westminster School, which he left at Christmas 1743. From thence he went to Caen in Normandy, where he remained until the year 1745, when the rebellion breaking out in Scotland he returned to that country at his father's request, joined the Royal Army, and was present at the battles of Culloden and Preston Pans; he remained with his regiment until 1763, when he returned to Scotland and had an annuity settled upon him by his father. He then went to the Continent, but his father being taken ill, he returned in 1765, and was present at his funeral, remaining in Scotland for some months afterwards. He then applied for the same apartments as his father was in the habit of occupying in Holyrood house, but such application failing of success, he went to London, where he usually passed the winter, coming to Somerville House in Scotland during the summer. In 1779, he took a lease for twenty-one years of a house in Henrietta-street, Cavendish-square, where he was assessed to and paid taxes, and being elected

The case of *Somerville* v. *Somerville*.

CHAP. X.

one of the sixteen peers attended the duties following upon such election. The two establishments were carried on in this manner, viz., In Scotland he kept up his full establishment, but in London two female servants only, when not resident, and brought servants with him when he came from Scotland; he lived, besides, in a very retired manner, seldom dined at home, and his establishment of servants was on board wages, and the house was not kept up upon a liberal scale; when sold, the furniture realized £140 only, and it appeared by the evidence that he himself considered Scotland as his home, and his house in London only as a temporary resting place. He died suddenly in 1796 in London intestate, leaving real estates in Scotland and in England, and a large sum of money in the English funds being described in the bank books as of Henrietta-street, Cavendish-square; and the question of domicil was, therefore, one of great moment.

In a case such as *Somerville* v. *Somerville*, which we are now considering, of course, the evidence was the guide to determine the question, and so far as the expressions of the intestate could be collected, this was of a somewhat conflicting character, for he had been heard to regret that he was not more in Scotland, and yet spoke of his connections and education being English, and seemed to have a leaning towards England. As the case was argued, the question was made with regard to the two countries only, England and Scotland, although he had certainly resided in other countries; but that was merely whilst on service, and that seemed to be assumed to be immaterial on the question of domicil. This might be considered more the case of two equal domicils, than of residence in various countries; but when investigated the difference of conduct with respect to each appears to be sufficiently great to bring it within the heading of this chapter, as the principle governing those cases was certainly that gone upon in this. The rules of the civil law, "*Ubiquis Larem rerumque ac fortunarum suarum constituit*," and "*Eam domum unicuique nostrum debere, existimari, ubiquisque sedes et tabulas*

Question of two domicils.

Rules of the civil law.

haberet, suarumque rerum constitutionem fecisset."—Cod. lib. 10, tit. 39, l. 7; Dig. lib. 50, tit. 16, l. 203, were fully recognised; and Somerville House in Scotland being undoubtedly his *principal* establishment, Scotland was held to be his domicil. Three great rules were then laid down by the learned judge which have ever since been recognized, and are now acted upon, namely, first, that the succession to the personal estate of an intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death. Secondly, that although for some purposes there might be two domicils, yet for the purpose of succession a man can have but one. And, thirdly, that the domicil of origin must prevail, until the party has acquired another by actual abandonment as well as acquisition. From these propositions, the following deductions flow; that in considering the domicil, the place of birth or death, or the situation of the property, does not affect the domicil, but the *animus* and *factum*. That it is absurd to suppose two domicils to be co-existent for the purposes of succession, and that the domicil of origin, although it may be the domicil of birth, is not necessarily so.

Succession to personalty regulated by the domicil.

One domicil only for the purpose of succession.

Animus et factum.

Domicil of origin and birth not necessarily identical.

From what has been observed, I think it follows, that whatever difficulty there may be in determining the question of domicil where the habits of the individual have been so desultory as to bring the circumstances attending his movements in many different countries into question, yet, if the principles upon which the courts act be well and clearly understood, there is little or no difficulty in applying them. Cases of this kind depend very much upon the evidence, and peculiarly require every particle of information to be brought forward that can possibly be obtained. If the evidence is sufficiently distinct and full, of course the difficulty is lessened, if it be scanty, or, as is sometimes the case, almost wholly wanting, the chief difficulty is to consider the *probabiles conjecturæ*, as so much must necessarily be presumed, and in doing this, it often happens that there is a balance of probabilities, and no doubt very difficult questions might thus arise; but where there is really such

Residence in various countries a question of evidence.

CHAP. X.

evidence as distinctly shows the course of a party's whole life, if the principles be understood and kept in mind, the inference must follow. There is scarcely a single case in which the rules applying to the whole subject have not, to a certain extent, been brought into discussion, and therefore, however we may sub-divide, and endeavour to classify and systematize the different branches, much will be found in each applying to the other, and it is only for the greater convenience of immediately turning to such points as especially apply to a particular branch that a classification is adopted. As the most important questions of domicil arise upon the residence in various countries, I have devoted more considerable space to that portion, but the general law will be more properly found under the consideration of what actually constitutes a domicil. *

I must now refer to one or two modern cases too important to omit considering. In *Hoskins* v. *Matthews*, (20 Jur. 196; 26 L. T. 110, and 4 W. R. 216), Robert Matthews was born at Bath in 1778; became a captain in the Swedish service, and in 1810 returned to England, where he married an English lady, and remained in England until 1822, when he was appointed to the British Consulate in Spain, and resided at Cadiz. He was afterwards consul in Portugal, and returned to England in 1833, living upon a retiring pension of £500 a-year, to continue until he should be re-employed; which never happened, and he received his pension until his death. From 1833 until 1838, he lived in England; in 1834, 1836 and 1837, he made visits to the Continent for the education of his children, and for his own health; but he never had any house of his own in England, but lived in lodgings at Bath, and in London, and it appeared that he

Residence abroad on account of health.

* The most recent case that has occurred on this branch of the subject is that of *Aikman* v. *Aikman*, Bell, Murray, & Young's Scotch Cases 850, affirmed in the House of Lords, but not yet reported on the appeal. In that case there were 1,500 printed pages of evidence. The case turned upon the question of legitimacy, depending upon whether the parent of an *ante natus* was domiciled in England or Scotland; the decision being in favour of the Scotch domicil, and thereby legitimatizing the child of a marriage subsequently solemnised between the parents.

had once contemplated purchasing an estate in England. In 1836 he was attacked with a spinal disease, and in 1838, his wife died at Worthing, where he then was, but which place he then left and determined to go abroad to take the baths in Germany, where he travelled and went to Florence, stayed a month, and proceeded to Naples and Rome, returning to Florence in the Spring of 1839, living at hotels for a few weeks, and then purchased a villa called the Villa Lorenzi with the furniture, gardens, &c., for £2,800. A correspondence took place between Robert Matthews and his solicitor, which was in evidence, showing his attachment to England, in which this passage occurred, "he supposed that Mr. Turner had not found a house for him, or he would have mentioned it." Until the 30th of July, 1850, he resided at Florence, except three or four months, which he passed in England, and from 1846 till and exclusive of 1850, he annually visited the German baths. At different times he purchased and endeavoured to purchase land at Florence, and in the mountains of Tuscany for change of air, where he also obtained oil. His health, however, declined; and being attacked by paralysis, he went to England and consulted Sir Benjamin Brodie, who strongly advised his return to Florence. The letters written by him sometimes spoke of Florence as "his home," but on another occasion he said, "my mind is on a spring cable looking towards England." In August, 1843, he made a Tuscan will, and thereby disposed of his Tuscan property; and alluded to his being buried there. This instrument was executed according to the law of Tuscany; but on the 24th of July 1845, he made an English will not valid according to the law of Tuscany, whereby he disposed of property not in Tuscany for the benefit of his younger children, on condition that they did not interfere with his Tuscan will. His property consisted of £60,000 stock in the English funds, French Rentes, in the Dutch funds, and English railway shares; and having no real property except the Villa at Florence; he had three bankers in London, and deposited his papers and the English will with Mr. Turner in England.

English and foreign wills by the same testator.

CHAP. X.

The testator had eleven children, most of the sons and one daughter being educated in England, for which he seemed to entertain a great attachment, being a Protestant, and greatly disliking Roman Catholics. He had no business in Tuscany, and was never naturalized there, but had permission to reside paying the tax upon foreigners, and said he would return to England had his health permitted. Probate of both wills was granted by the Prerogative Court of Canterbury; and the question was whether the domicil of Matthews when he executed the two wills and at the time of his death was English or Tuscan? This case, it must be admitted, presents almost as great a complication of circumstances as can be imagined, and no doubt there was great difficulty in applying the well-known principles of the law of domicil to it, and after a very elaborate discussion and able arguments, Vice-Chancellor Wood thought that the testator had lost his English and acquired a Tuscan domicil. This decision being appealed from, Lord Justice Turner acquiesced in that opinion, and decided accordingly, and although Lord Justice Knight Bruce differed from him it had the effect of affirming the judgment of the court below. This difference of opinion in the case of such eminent judges not only shows the extreme difficulty raised by the circumstances and conduct of the party, but leaves it the more open to comment; and some observations made by Lord Justice Turner are worthy of special reference. His lordship said that it was a case which turned upon the *animus* of the party; and no doubt, the purchase of a Florentine villa and land in Tuscany were strong circumstances in favour of the acquirement of a Tuscan domicil, more particularly when such act was further confirmed and strengthened by the fact of residence; for there were both the *animus* and *factum*, the two necessary ingredients to the acquirement of a new domicil. On the other hand, there was much to show that he had an hankering after his native country, and added to the circumstance of the extent and position of his property in England, it might be a question whether some act, showing a clear intention to

Difference of opinion in the appellate courts.

abandon the Tuscan domicil would not have operated as a reverter of his English domicil of origin; but the thing savouring such a reverter was the coming to England for medical advice, and the attempt he had evidently been making through his confidential adviser Mr. Turner, to obtain a residence in England. There was, therefore, very much to support the decision come to; but when it is considered that so able a lawyer as Lord Justice Knight Bruce was of a contrary opinion, or rather did not concur in the opinion arrived at by his coadjutor, it naturally tends to a consideration of the conclusiveness of the result arrived at. As is usually the case where one judge of appeal (out of two) differs from the other, the dissentient seldom thinks it requisite to express reasons in detail for such non-concurrence, but in the case before us, two expressions used by the learned judge of appeal who did express his opinion might be grounds *inter alia* for such non-concurrence. The expressions I refer to are, that the case turned "upon the question of *animus*," and that the case was "not one of compulsory residence on account of ill-health." I shall not comment on these expressions, but leave them to the consideration of the learned reader; and refer him to the case of *Johnstone* v. *Beattie* 10 Cl. & Fin. 42 & 139. In *Bremer* v. *Bremer*, (1 Deane Eccles. Rep. 192), General Calcraft, an officer in the East India Company's service, being resident in the West Indies in 1795, a daughter (the party in question) was born there, In 1805 she came to England in company with her mother and sister, her father subsequently coming to this country also, and they all resided together until 1825, when her mother dying, she left England and went to France with her governess, proceeded to Rome, and other parts of Italy, and it was said, that whilst in Italy she had married an Italian named Allegri; but this fact rested only upon the evidence of the party herself oral and written, which fixed the event as having taken place in 1830, but it was not communicated to her relations until 1840 or 1841, when her father was no more, he having died in 1835. In 1840, her sister, who at the death of her father had gone to reside with her in Paris, died, and she then went by the name of Allegri; her sister

Case of *Bremer* v. *Bremer*.

CHAP. X.

having denied that such marriage had ever taken place. She then resided in Paris for fifteen years in furnished lodgings in the *Boulevard des Capucines*, and elsewhere, renewing from time to time the terms of three or six years for which she held those apartments, where she died in September, 1853, having purchased a grave in the cemetery of *Père La Chaise*, in which her sister was buried, and where she wished her own remains to be deposited. The apartments in Paris were furnished with her own furniture, and she adopted the religion of the country, Roman Catholicism; but she never obtained letters of authorisation from the French sovereign. With respect to the alleged marriage, it appeared that, upon being pressed by Mr. Freeman, her solicitor, with respect to the fact upon the transaction of some legal business, she was considerably agitated, and she admitted to him that she was not married; although in her will she described herself as "Fanny Allegri neé Calcraft," and executed the will in the same words. By this instrument she dealt with £300 per annum which she possessed in India, considerable property in England, and except some charitable legacies to institutions in Paris, the will which was made in English disposed of all this property in favour of English persons, and appointed English executors. Upon these facts the questions were, in what country the deceased was domiciled when she made her will, and at the time of her death, and what the nature of her domicil, and the legal effect thereof was upon her testamentary acts.

Adoption of religion.

Description in will.

English will made in France.

We have seen the circumstances attending Miss Calcraft's various movements, upon which Sir John Dodson considered that her domicil of origin was Anglo-Indian, afterwards that she acquired an English one, and that while she was travelling abroad, she had not abandoned such English domicil. If the marriage with Signor Allegri had been proved, that would have established an Italian domicil; for the domicil of the wife followed that of the husband, but although she both said and wrote an assertion of the fact, and described herself in her will and executed it as Madame Allegri, she confessed to her solicitor

that she was not married, therefore, there was no evidence of such marriage; *prætexit nomine culpam.* In her correspondence she expressed her intention "*not* to return to England, but to *live* in France when she could." If the domicil was French, it was according to the *jus gentium*, and *de facto* only. Time alone would not (the learned judge observed) constitute a domicil; a person might *remain for fifty years with an intention to return*, and the original domicil was not considered to have been abandoned, and undoubtedly this was quite true. Long residence in one place was a material ingredient, and from which an intention might be collected, and in the present case his opinion was that the deceased was domiciled in France, although not by authorization.

Intention not to return.

Time not sufficient to constitute a domicil.

A will is good or bad according to the law of the country where the party is domiciled, and upon this point the opinions of French advocates had been taken, and they were contradictory. The 13th article of the Code Napoleon is as follows; "L'étranger qui aura été admis pour le gouvernement à etablir son domicile en France y jouira de tous les droits civils tout qu'il continuera d'y résider," that is, a stranger receiving the authorization of the Government establishing his domicil in France is to enjoy all civil rights there, and *inter alia* of course, the making a will, and therefore, those who had not received such authorization could not make a will; "Demolombe's Cours de Code Civil," p. 143, sect. 140, Droit Civil, applies to civil rights, although used ambiguously, p. 144; and it is clear upon that authority that a mere domicil s not sufficient without authorization. (*De Verne* v. *Routledge*, Sirey's Rep. 1852, Cod. Nap. 319.)

French authorization.

The laws of France with respect to making a will apply as well to foreigners domiciled in France (whether naturalized or not) as to French subjects; *locus regit actum* is the principle, whether domiciled or not, and even if a person had only been in France 24 hours. That, however is not the law with respect to British subjects, and it was the opinion of M. Marie, avocat de Cour Imperiale à Paris, that Miss Calcraft was not legally domiciled in

French law as to making a will.

CHAP. X.

France. The 10th article of the Code Napoleon applies to the legal domicil which is constituted not by the caprice of the party residing, but by the observance of certain legal dispositions which are clearly defined in article 102, *et seq.* of Cod. Nap. Suppose a person having a legal domicil at Bourdeaux came to reside in *Paris*, and died there, his domicil would be at Bourdeaux. Persons residing in a permanent manner are called "Incolats." No act of a party without authorization can make a legal domicil in France. Sirey's Reports, 1851, *Lynch* v. *Lynch*. Moveables of a foreigner not having a legal domicil according to the law of France are governed by the law of the country he belongs to; and this is an anomaly, for it might be held in this country to be a French domicil, and therefore, a man having property in France, and not being domiciled by authorization, can make a good disposition of it by a will in the English form, especially if it be personalty; but the French authorities call on the executors to give security according to the law of France.

Moveables belonging to an Englishman in France.

French designation of the different species of domicils. Baron Mecklenburgh's Case.

The different domicils are called "serieux," "civil," "politique," "ordinaire." But by Baron Mecklenburgh's case, in the "*Journal des Tribunaux*," "Il attendu qu'il résulte, soit de toutes les circonstances de la cause, soit des documens produits que le Baron de Mecklenburgh avait à Paris son principal et même son unique etablissement; que, depuis 1828, il n'avait conservé aucun à l'étranger. Attendu qu'il résulte de ce fait le conséquence légale que le dit Baron de Mecklenburgh avait son domicil à Paris, et que sa succession s'y est ouverte. Attendu qu'il importe peu que le Baron de Mecklenburgh n'ait pas été autorisé par le gouvernement Francais un jour en France des droits civils; que en effets, la jouissance légale de ces droits est indépendante de la quest ion de domicile que ne reposer que sur celle de savoir ou est en France le principal etablissement de l'étranger que y residé, par ces motifs le tribunal rejette le declinatoire, et dèclare competent dit qu'il sera plaide au fond neuvoie la cause a quinzaine pour les plaidoiries; condamne les parties de superche aux dépens de l'incident." But on the 26th of July, 1856, the

superior court reversed that judgment. This case appeared to Sir John Dodson to be directly in point, and that authorization was necessary by the French law; and he held accordingly that Miss Calcraft was domiciled in France according to the *jus gentium*, but no farther; and that consequently she could make an English will of personalty, when all her relations, &c. were English, and that therefore she was domiciled in England, and probate must be granted. This decision was appealed from to the Judicial Committee of the Privy Council, who delivered their judgment on the 10th of May, 1857, and which is reported in 5 W. R. 618, who reversed the decision of the court below. The above case settles the important principle that any testamentary instrument to be valid must be made in the form prescribed by the country in which the party is domiciled at the time of *death*, and that such domicil need only be a domicil according to the *jus gentium* and not by authorization, that is, that if an Englishman gains a domicil recognised by the English law as such in a foreign country, and makes a will in the English form, such instrument is invalid, because it is not in such a form as would be valid according to the law of the country where by our law he is considered to have gained a domicil, although that domicil would not be recognised in that country as far as regards the operation of authorization or naturalization, but only by the *jus gentium*. *Whicker* v. *Hume*, 6 W. R. 813.

Domicil by the *jus gentium*.

Will must be governed by the *lex loci*, regulated by the English view of the domicil.

The following authorities have reference either to the American law as to residence in various places, or as to the view our old law took of settlement, and will be useful to refer to as settling analogous principles to those now laid down as to the law of domicil. *Inhabitants of Fitchburg* v. *The Inhabitants of Winchendon*, 4 Cush. Amer. Rep. 190; Story's Confl. Laws, 46; *Ware* v. *The Inhabitants of Sherburne*, 8 Cush. Amer. Rep. 267; *Winthrop* v. *Inhabitants of Waltham*, ibid. 327; Vattel Translat. 1793, p. 203; *Regina* v. *The Inhabitants of St. Olave's*, 1 Strange 51; *St. Mary Colechurch* v. *Radcliffe*, ibid. 60; *The Inhabitants of Abington* v. *The Inhabitants of Bridgwater*, 23 Picker. Amer. Rep. 170; Coke Instit. 2, p. 120.

American cases as to residence in various localities.

CHAPTER XI.

CONCLUSION.

HOW DOMICIL IS AFFECTED BY WAR—FOREIGN CORPORATION IN TIME OF WAR—PLEA OF AN ALIEN ENEMY—CORPORATION AND INDIVIDUAL THE SAME—AMERICAN CASES—NEUTRAL DEEMED AN ALIEN—HOUSE OF TRADE IN A HOSTILE COUNTRY—TREATY—RELATIONS SUSPENDED—DERIVATIVE DOMICILS—STATUS IN FRANCE AND SCOTLAND—ENVOY OR AMBASSADOR—PROPERTY LEFT IN A FOREIGN COUNTRY—NATURALIZATION—QUESTION AN INTERNATIONAL ONE — NEUTRALIZATION OF THE RIGHTS FLOWING FROM THE FACT OF DOMICIL.

CHAP. XI.

As the condition of being at war materially alters the relations of the belligerent powers in many respects, it may not be improper to consider how the question of domicil is affected by it. In the American reports, the case of *The Society for the Propagation of the Gospel* v. *Wheeler*, 2 Gallison, before Justice Story of the Supreme Court, and Judge Sherburne, of Exeter, New Hampshire, October 1814, contains some very apposite observations upon this subject. The margiual note is this, "If a foreign corporation established in a foreign country sue in our courts, and war intervenes between the countries pending the suit, there is not sufficient to defeat the action, unless it appears on the record that the plaintiffs are not within any of the exceptions which enable an alien enemy to sue. There is no legal difference as to the plea of alien enemy between a corporation and an individual." Story, Justice, in the course of the case made the following observations, "It is said that a corporation established in an enemy's country acquires the enemy's character from its

War not sufficient to defeat an action by a corporation.

domicil, and that a member of the corporation is a subject of the enemy and personally affected with the disability of hostile alienage. It is true that as to individuals their right to sue in the courts of a belligerent, or to hold or enforce civil rights, depends not on their birth, and native allegiance, but on the character which they hold at the time when those rights are sought to be enforced. A neutral or a citizen of the United States who is domiciled in the enemy's country, not only in respect to his property, but also as to his capacity to sue, is deemed as much an alien enemy as a person actually born under the allegiance, and residing within the hostile nation. This has long been settled on the general law of nations." *Omealy* v. *Wilson*, 1 Campb. p. 482, *Mac Connell* v. *Hector*, 3 Bos. & Pull. 113. The same principle applies to a house of trade in a hostile country Although the parties may happen to have a neutral domicil, the property of the house being for such purpose considered as affected with the hostile character of the country in which it is employed. In these respects a corporation authorised by its charter to carry on trade, and established in a hostile country, such as the East India Company, would, no doubt, be placed as to its property within the same rule, even admitting its members possessed of a neutral domicil. A corporation is held to be an "inhabitant and occupier," under the 43 Eliz. c. 2. *Rex* v. *Gardner*, Cowp. 83.

A party domiciled in an enemy's country.

House of trade.

A corporation an inhabitant.

So far as our law is concerned, unless the matter be regulated by treaty, the same rules which apply in time of peace would apply in war also, with regard to our interpretation of the acts of any individual in a foreign country, that is, as to the mere fact of where or what domicil is; but, if there be any rights flowing from that fact, these, *primâ facie*, except as above, would be entirely suspended. This may be instanced by the inseparable connection which must always subsist between the *status* of a party, and his or her domicil; what I chiefly refer to is the derivative title which a party may acquire as being under age, or any of those disabilities or subjective situa-

Domicil simply as to the fact unaffected by war.

CHAP. XI.

Different view of various countries as to *status*.

tions where the domicil is not original, but follows that of some other person. In several of the cases before referred to it has been seen how differently this *status* is regarded and acquired in different countries, especially in France and Scotland; in the one certain formalities being necessary, as applied to the individual, and in the other, those formalities when applied to others, having retrospective reference to that individual. Vattel states p. 103, s. 218, "that an envoy at a foreign court has no settlement (domicil) at that court, the natural or original one being that which we acquire by birth in the place where our father has his house, and we are considered as retaining it till we have abandoned it in order to choose another. The acquired settlement (*adscititium*) is that where we settle by our own choice."

Ambassador not affected by war.

We can easily understand how an envoy can acquire no domicil at a foreign court, for although it may, and often does happen that the same person fills the office at the same court for many years, yet, the office, like all others under Government, may be determined by the will of that power at any moment, and never, even in the case of a so called permanent situation, can be regarded as certainly lasting, and in the case of an envoy or ambassador, must from its very tenure be liable to change. This, therefore, takes away the very element necessary to constitute a domicil, namely, an intention to remain, for no such intention can exist where the party entertaining it may not have the means of carrying it out. War arising between our country and a foreign State would, therefore, not affect the case of a plenipotentiary. The persons most open to its operation would be those, who, having gained a foreign domicil, and possessing property in another country, abandon it, but stil possess property in that country where the belligerent state arises, or where they are still resident, and not having abandoned, are still (in a state of peace) entitled to certain privileges in consequence of such domicil. The property in the one case and the person in the other would be materially affected by such a change of relations, and forfeiture and disabilities of various kind must necessarily follow, in the ab-

Property in an enemy's country.

sence, as I said before, of special treaty reserving some right to an alien. This would not, of course, apply to a naturalized subject; for there a complete abjuration of civil and political obligations *ipso facto* follows the act, and the party is to all intents and purposes the same as a natural born subject except certain disabilities to which he is subject.

A naturalised subject.

There is in France a species of naturalization of illegitimate children; but this differs rather in the solemnities with which it is attended, than in the effects which it produces on the rights and liberties of its object. Where the case is not provided for by international legislation, as a general rule, all relations, as applicable to natives of the country with which the other is at war, are entirely cut off; and, subject to the same exceptions, their liberty, property and rights of all kinds, are at the entire mercy of the country in which they are. This, of course, does not refer to what may be or has been done, but to what the belligerent state has the power to execute or enforce; and it is only necessary to refer to our condition in relation to the continent immediately succeeding the peace of *Amiens* to make what I mean intelligible. A question might arise how far a residence in a foreign country under the circumstances attending the prisoners of Verdun although voluntary (see *Clavering* v. *Ellison*, 4 W. R. p. 330) could be considered as such; but, I apprehend, so far as the mere fact is concerned, even that condition would make little difference, inasmuch as the absence of choice, or compulsory residence, could not alter the effect of direct evidence of intention; for the will, at all events, is free, although circumstances render the exercise of it impossible. The effects of war on domicil therefore, are so uncertain and limited in their operation that it would be impossible to lay down anything but general rules with respect to it. A question upon this branch of domicil can only be made internationally, and that must depend upon the particular facts of each separate case. The chief points to be considered are, the relative position of the countries, politically speaking—the obligations, legally speaking, of the individual, and the position and nature of his property, and whether he

French legitimization.

The prisoners of Verdun.

The effects of war on domicil limited and uncertain.

CHAP. XI.

Circumstances of the belligerent countries and of the individual must be taken into account.

be an alien in the strict sense, and if not, what forms have been gone through affecting his national rights. By these we must be guided; once possessed of the facts, we can easily apply the general principles of law which I have endeavoured in the preceding pages to elucidate and classify.

War as affecting the subjects of a State.

At a former page of this work I have incidently referred to the pertinent observation of an American judge upon the subject of the impossibility of a man having two domicils, and *inter alia*, occurs this passage, "If a man had two domicils within the limits of distant sovereign States, in case of *war*, what would be an act of imperative duty in one, would make him a traitor to the other, *as not only sovereigns but all their subjects collectively and individually are put into a state of hostility by war.*"

Domicil in a native country and possession of property in that of an enemy.

To put the case, therefore, of possession of property in a foreign country with a domicil there, without naturalization, there would be the mere possession without any of the obligations attached to such possession, and therefore, if there were any right attaching from the fact of being domiciled in that country, they would be effectually neutralized by the fact of the possessor being in other respects an alien enemy; and if he were domiciled in his own country, and possessed property in the other, there would be the rights flowing from the fact of domicil, without the means of enforcing them, which therefore would avail a man little merely as such in time of war. A most interesting case applicable to this branch of the subject occurred very recently, and is fully reported in the 7th volume of the Weekly Reporter at page 387; it is the case of *Hodson* v. *De Beauchesne*.

Conclusion.

Having now, I believe, referred to all the various branches of the English law of domicil, and to almost every authority in any degree bearing upon such law, I shall here respectfully take leave of the subject and my readers, trusting that my labours have not been altogether useless.

THE NEW STATUTE.

DOMICIL has never been hitherto made the subject of legislative enactments, for many reasons. First, that as it is an international question, the conflict of laws renders it extremely difficult for any law passed by one country to effect that which is regarded differently in almost all. And, secondly, that it has become a separate question only in very modern times, and grown upon us almost imperceptibly; by reason partly, as has been justly thought, of the increase of the habit of foreign residence by British subjects. It appears from the first of these reasons to flow as a consequence, that unless an universal comity of nations could be arranged, nothing effectual can be done. The statute which Lord Kingsdown has presented to Parliament is entitled "An Act to Amend the Law with respect to Wills of Personal Estate made by British Subjects." The following is a short abstract of the enactments. First, That wills made by a British subject out of the Kingdom as regards personal estate, are to be admitted to probate in England and Ireland, and to confirmation in Scotland, whatever may be the domicil of the testator at the date of his will or death, if made according to the law of the place where they are made, or the law of the place of domicil, or the law of any part of the United Kingdom. Second, That wills made within the United Kingdom (whatever the domicil at the date or death) by a British subject, shall, as regards personal estate, be held well executed, and admitted to probate in England and Ireland, and to confirmation in Scotland, if executed according to the local usage. Thirdly, That no change of domicil is to invalidate a will. Fourth, That the Act is not to invalidate wills of personal estate, otherwise valid, except as revoking a will made valid by this Act. Fifth, that the Act is only to apply to persons dying after the passing. It is only necessary to refer to the foregoing pages to show the very unsatisfactory condition in which the law of domicil now is; and it must, therefore, be a great satisfaction to

every thinking man who takes any interest in the laws of his country to see *any* step taken (however problematical the result may be), to deal with such a subject as domicil. One thing, at least, I must say, that the Act before us is a perfect model of perspicuous condensation, and, at all events, whatever effect it may have, it cannot be misunderstood. Having turned my attention particularly to this branch of English law, I am perhaps more alive to the difficulties that surround it, and I confess I despair of the present possibility of framing any statute which will have any very comprehensive effect. This Bill is confined to wills of personalty also restricted to the United Kingdom as to probate, but unrestricted as to domicil. It is true that many of the cases which have occurred, or may occur, relate to wills of personalty; but there are many other branches of this important subject, such as legitimacy, legal rights, &c. left untouched, and I believe a feeling exists in the legal profession that, if it pass into a law it will be of limited utility. An able article upon this subject has appeared in the *Solicitors' Journal*, going deeply into the origin and progress of our testamentary law, and dealing also with the subject of international codes, to show how far a comity of nations actually exists; the writer feeling the great importance of this point. The operation of British Acts must, necessarily, be confined to British subjects and their property as distributed by our law, but, whilst each country is possessed with a conviction of the wisdom of its own code, it is hopeless to expect that any legislative enactment (however cleverly drawn) can, comprehensively, alter or improve a law such as this; as a whole. This however, is, no reason why it should not at least be made trial of; for it cannot be denied that many of the cases which have given rise to the greatest amount of difficulty and expense would have been rendered comparatively simple, at least, in part, if such a law had previously been passed.

YATES & ALEXANDER, PRINTERS, HORSESHOE-COURT, 32A, LUDGATE-HILL, E.C.